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Supreme Court of the United States.

OCTOBER TERM, 1922.

No. ~~[illegible]~~ 34

GEORGE F. SHAFER, ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, AND FRANK MILHOLLAN, C. W. MCDONNELL AND FAY HARDING AS THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, *Appellants,*

vs.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR COMPANY OF WIMBLEDON, ET AL., *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION.

Appellees' Brief.

H. A. LIBBY,
Grand Forks, North Dakota,
WILLIAM A. LANCASTER,
DAVID F. SIMPSON,
JOHN JUNELL,
JAMES E. DORSEY,
ROBERT DRISCOLL,
630 1st Nat-Soo Line Bldg.,
Minneapolis, Minnesota,
Attorneys for Appellees.

Hayward Brief Company, 518 Fourth Ave. So., Minneapolis

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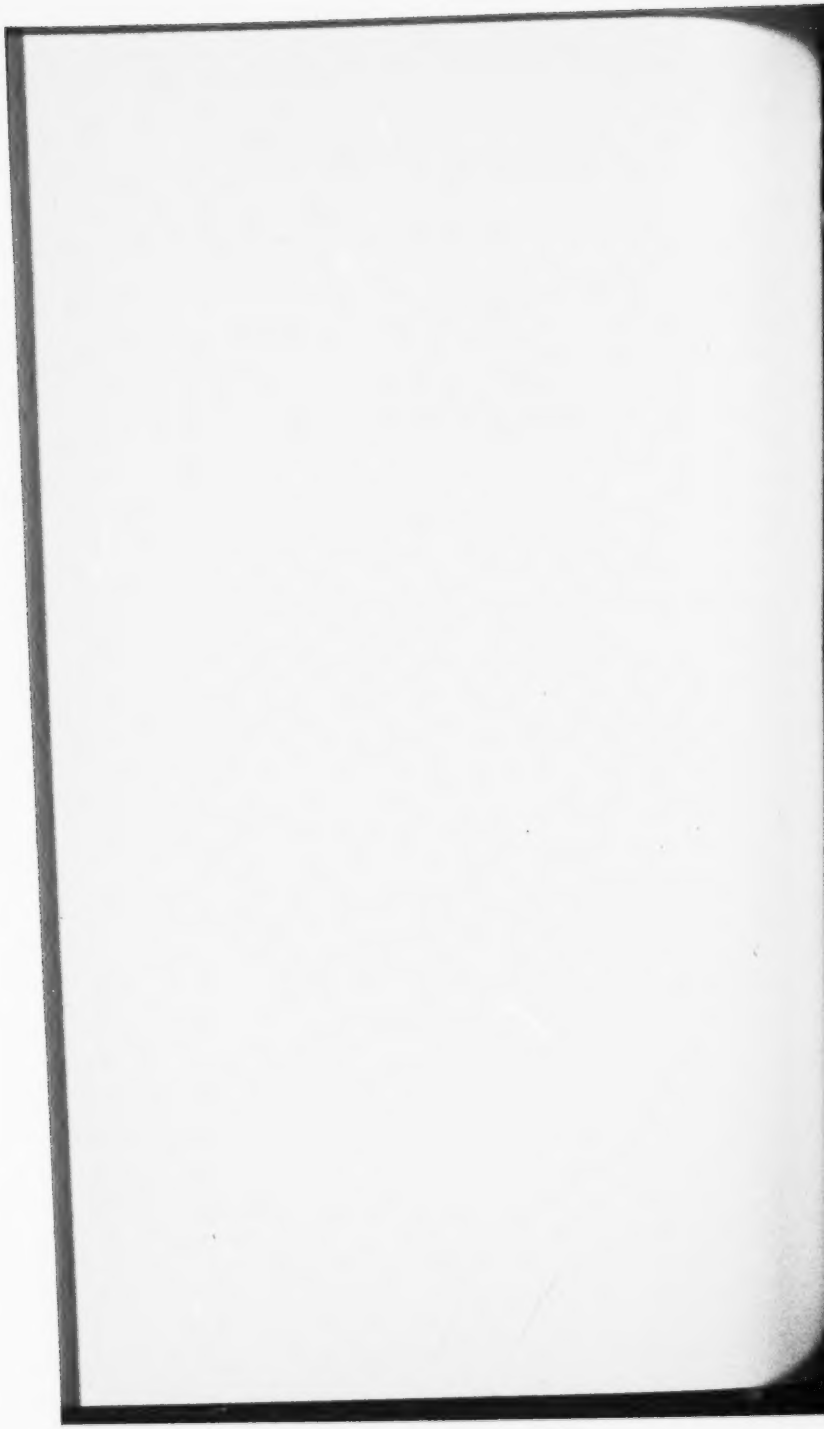

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 958.

GEORGE F. SHAFER, ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, AND FRANK MILHOLLAN, C. W. MCDONNELL AND FAY HARDING AS THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, *Appellants,*

vs.

FARMERS GRAIN COMPANY OF EMBDEN, FARMERS ELEVATOR COMPANY OF WIMBLEDON, BERWICK FARMERS GRAIN COMPANY, GRANDIN FARMERS GRAIN COMPANY, HAMPDEN FARMERS ELEVATOR COMPANY, WALHALLA CO-OPERATIVE ELEVATOR COMPANY, GLENFIELD CO-OPERATIVE ASSOCIATION, FARMERS CO-OPERATIVE ELEVATOR COMPANY OF CANDO, BENEDICT FARMERS CO-OPERATIVE ELEVATOR COMPANY, FARMERS ELEVATOR & MERCANTILE COMPANY OF ROGERS, CAYUGA FARMERS ELEVATOR COMPANY, LYBECK GRAIN COMPANY, I. L. BERGE ELEVATOR COMPANY, REGAN & LYNESS ELEVATOR COMPANY, KENSAL FARMERS ELEVATOR COMPANY, CHAMLEY BROS. GRAIN COMPANY, GWINNER FARMERS GRAIN COMPANY, FREEBORN ELEVATOR COMPANY, HAZEN GRAIN COMPANY, ELDRIDGE FARMERS ELEVATOR COMPANY, CARRINGTON GRAIN COMPANY, PINGREE GRAIN COMPANY, FARMERS GRAIN COMPANY, CARGILL ELEVATOR COMPANY, OCCIDENT ELEVATOR COMPANY, CORPORATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF NORTH DAKOTA, W. M. NODDINGS, DOING BUSINESS AS THE NODDINGS GRAIN COMPANY, L. L. KRUCHTEN, DOING BUSINESS AS THE PERTH ELEVATOR, J. C. SMITH, DOING BUSINESS AS ALEXANDER GRAIN COMPANY, F. M. COOK, DOING BUSINESS AS THE WOODWORTH GRAIN COMPANY, JOHN A. AIRD, ALEXANDER HARCHANKO, DOING BUSINESS AS THE INDEPENDENT ELEVATOR COMPANY, ROBERT FLEMING, JAMES WHELAN, PIERCE BLEWETT, DOING BUSINESS AS THE STAR ELEVATOR COMPANY, HANS NEILSON, DOING BUSINESS AS THE ELK VALLEY FARMS COMPANY, E. H. RAY, ARNOLD BROS., C. H. SHELDON, LOUIS GJERE, DOING BUSINESS AS THE CANDO GRAIN COMPANY, SCHILLING & KRUGER, O. B. SORENSON, V. W. STEELE, DOING BUSINESS AS JUD ELEVATOR COMPANY, JOHN SOUTHALL, J. A. FRANK, H. C. SORENSON, DOING BUSINESS AS THE INDEPENDENT ELEVATOR COMPANY, JOHN BIBELHEIMER,

DOING BUSINESS AS THE WASHBURN GRAIN COMPANY, N. O. PARSONS, DOING BUSINESS AS THE INDEPENDENT GRAIN COMPANY, A. C. ANDREWS, DOING BUSINESS AS THE ANDREWS GRAIN COMPANY, ALL IN THE STATE OF NORTH DAKOTA, AND ACME GRAIN COMPANY, ATLANTIC ELEVATOR COMPANY, GEORGE C. BAGLEY ELEVATOR COMPANY, COLUMBIA ELEVATOR COMPANY, DODGE ELEVATOR COMPANY, EMPIRE ELEVATOR COMPANY, GREAT WESTERN GRAIN COMPANY, IMPERIAL ELEVATOR COMPANY, MILLER ELEVATOR COMPANY, MINNEKOTA ELEVATOR COMPANY, MONARCH ELEVATOR COMPANY, NATIONAL ELEVATOR COMPANY, NORTHLAND ELEVATOR COMPANY, OSBORNE-McMILLAN ELEVATOR COMPANY, POWERS ELEVATOR COMPANY, RUGBY ELEVATOR COMPANY, ST. ANTHONY & DAKOTA ELEVATOR COMPANY, VICTORIA ELEVATOR COMPANY, WINTER-TRUESDELL-AMES COMPANY, WOODWORTH ELEVATOR COMPANY, AND INTERNATIONAL ELEVATOR COMPANY, CORPORATIONS ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE LAWS OF THE STATE OF MINNESOTA, *Appellees.*

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NORTH DAKOTA, SOUTHEASTERN DIVISION.

Appellees' Brief.

STATEMENT OF CASE.

This case involves the validity of a Statute of North Dakota which was passed as an initiated measure at a general election held in the State of North Dakota on November 7th, 1922. This Statute is known as the North Dakota Grain Grading Act and, as appears from its preamble, it declares the purpose of the State of North Dakota to supervise and regulate the marketing of farm products and is designed to prevent unjust discrimination, fraud and extortion in the marketing of same, establish a system of grading, weighing and measuring farm products, define the scope and manner of such supervision and the powers and duties of the persons charged with same, and provide for licensing buyers, solicitors and

warehouses handling such farm products. It was initiated and passed to replace Chapter 138 of the Laws of North Dakota for 1919, which was declared unconstitutional by this Court in the case of *Lemke v. Farmers Grain Company of Embden, N. D.*, decided on February 27th, 1922, and reported in volume 66 of the Lawyers' Edition of the Supreme Court Reports at page 273, and in *Lemke v. Homer Farmers Elevator Company, et al.*, decided the same date and reported in 62 L. Ed. 280.

The Court below, consisting of Circuit Judge Wm. S. Kenyon and District Judges J. W. Woodrough and J. S. Elliott, sitting as the District Court of the United States for the District of North Dakota, Southeastern Division, pursuant to Section 268 of the Judicial Code, granted a temporary injunction against the enforcement of this initiated law. The appeal questions the correctness of this ruling.

The case is presented to this Court on a record which discloses a situation identical with that disclosed by the record in the case of *Lemke v. Homer Farmers Elevator Company*, 66 L. Ed. 280, which was No. 604 on the October, 1921, Term of this Court. In that case, this Court found that "the facts are not materially different from those presented in the former case (*Lemke v. Farmers Elevator Company of Embden*, 66 L. Ed. 273, No. 456, October, 1921, Term), and the reasons therein stated for the conclusion reached are controlling here." This applies with equal force to the present case with the single exception of a change in the phraseology of the statute involved. For this reason, and because the time available for the preparation of this brief is so short, we do not deem it necessary to rehearse again at length the facts regarding the manner in which the grain trade is carried on and conducted in the Northwest. The facts are admirably summed up in the opinion of this Court in *Lemke v. Farmers Grain Company of Embden*, 66 L. Ed. 273, and in the opinion of the Circuit Court of Appeals for the 8th Circuit, in the same case, which in that Court

was entitled *Farmers Grain Company of Embden v. Langer*, 273 Fed. 635. All the facts commented on in either of these opinions are clearly disclosed in the present record.

The appellees represent and include all types of elevator companies,—Farmers co-operative elevator companies, which operate single elevators on a co-operative plan, independent elevator companies operating single elevators, and line elevator companies operating as many as ninety-five elevators in North Dakota. Each of these appellees is engaged in the purchase of grain from the farmers in North Dakota for shipment to the large terminal markets, principally in Minnesota, and this transaction has been definitely determined by this Court to be an integral part of interstate commerce by the decision in *Lemke v. Farmers Grain Company of Embden*, 66 L. Ed. 273.

The appellants, who were substituted for the original defendants below, are the officials of the State of North Dakota, who by the most recent Grain Grading Act, the constitutionality of which is here involved, are charged with the duty of enforcing State supervision and regulation over the marketing of grain.

In the cases involving the validity of the 1919 Grain Grading Act of North Dakota, there were three questions of law involved which were stated by the Circuit Court of Appeals for the 8th Circuit, in *Farmers Grain Company of Embden v. Langer*, 273 Fed. 635, at page 643, as follows:

> "(1) Is the purchase of grain in the State of North Dakota for shipment out of the State as detailed in the evidence a part of the interstate commerce involved in the shipment?
>
> (2) If the foregoing question should be answered in the affirmative, does Chapter 138, Session Laws North Dakota, 1919, impose a direct and unreasonable burden upon that interstate commerce?
>
> (3) Is said law in conflict with United States Grain Standards Act to such an extent as to render it void?"

To each of these questions, that Court gave an affirmative

answer. By the decision of this Court in *Lemke v. Farmers Grain Company of Embden*, 66 L. Ed. 273, the first of these three questions is eliminated from the present discussion. The second question is at least partially eliminated. This Court having held that the 1919 Act did impose a direct and unreasonable burden upon interstate commerce, the second question resolves itself simply into whether or not there is any substantial difference in respect to the effect on interstate commerce between the 1919 Act and the latest Grain Grading Act.

The question of whether or not the North Dakota Act conflicts with the United States Grain Standards Act, this Court expressly refused to decide in the former cases.

In addition to the questions already mentioned, the elevator companies, in the cases in which the 1919 Grain Grading Act was held invalid, urged at all times that, in addition to the many other reasons for its invalidity, its enforcement would deprive the elevator companies of their property without due process of law in violation of the Fourteenth Amendment to the United States Constitution. A decision of this question was rendered unnecessary by the holding of this Court in support of the other contentions of the elevator companies. We again submit this as an additional factor in the present case.

In support of the temporary injunction granted by the Court below, we therefore invite this Court's attention to the following propositions upon which we rely in contending that the latest North Dakota Grain Grading Act is invalid.

I.

The North Dakota Statute is a violation of the commerce clause of the Federal Constitution.

1. The sale of grain by the farmer in North Dakota to the elevator company for shipment to the terminal markets is an inherent part of interstate commerce in grain. This can no longer be questioned.

2. There is no substantial distinction between the latest Grain Grading Act and the 1919 Act, insofar as the effect on interstate commerce in grain is concerned, and the Act here involved imposes a direct and unreasonable burden upon that commerce just as the former Act did.

II.

The new Act conflicts with the United States Grain Standards Act authorizing the establishing of federal grades and Service and Regulatory Announcements, Nos. 33 and 46, establishing thereunder official Grain Standards of the United States for wheat, shelled corn and oats.

III.

The new Act is in conflict with the Fourteenth Amendment to the Federal Constitution in that it interferes with the right of individuals, and especially the owners of elevators and mills, to make contracts.

All of the above points are argued in the following brief, but we feel confident that, although a first reading of the latest North Dakota Grain Grading Act might suggest that some of the objectionable provisions of the former law have been omitted, a careful examination of the new Act will clearly indicate that such is not the case, but that, on the other hand, the purpose, effect and result sought by the new Act are identical with the purpose, effect and result of the former law and that the means of accomplishing the desired purpose, namely, State control of the marketing of grain in interstate commerce, are, in fact and in legal effect, the same under both laws. There is, to be sure, considerable difference in phraseology and wording, which may be accounted for by the necessity of shortening the Act and making it more general for convenient submission to the electorate, but there is apparently no attempt, in framing this latest North Dakota Grain Grading

Act, to recognize or submit to the decisions of the Federal Courts rendered in cases directly involving the former law, limiting the power of the State of North Dakota in respect to the marketing of grain in interstate commerce and announcing the exclusive power of Congress to regulate such interstate commerce. The new Act is a mere re-assertion of a power which the State still claims in spite of the express denial of its existence by this Court in the former cases.

STATEMENT OF FACTS.

DEFINITION.—In the record, the terms "primary market" and "terminal market" are used in referring to the markets where grain is received by rail from many localities. In this brief, we refer to these markets as "terminal markets" and the elevators there located as "terminal elevators." The market to which the farmer hauls his grain is referred to in the record indiscriminately as the "local market," "farmers' market" and "country market." In this brief, we refer to this market as the "country market" and the elevators there located as "country elevators."

COMMERCE IN NORTH DAKOTA GRAIN IS LARGELY INTERSTATE. —North Dakota produces more spring wheat than any other state in the Union. Its crop varies from one hundred million bushels to one hundred fifty-six million bushels annually. This great quantity of wheat when marketed moves largely to other states. Approximately ninety per cent of the wheat raised and sold in North Dakota is bought for shipment to and is actually shipped to the terminal markets outside of the State, principally to the Minnesota terminals at Minneapolis and Duluth. Only ten per cent is sold for use within the State of North Dakota. It thus appears that consumers throughout the United States are largely dependent upon the wheat grown in North Dakota for their supply of flour and other wheat products, and conversely the producers of wheat in North Dakota are largely

dependent upon the demand in other states for a market for their grain.

This general situation has existed for many years and facilities have been developed in recognition of its existence and its permanency. Country elevators have been built connected with railroad tracks at all stations within the grain growing area throughout North Dakota by men and companies engaged in handling this grain. Approximately twenty-two hundred such elevators are operated within the State of North Dakota. These elevators are of limited capacity and are used largely to facilitate the transferring of grain from the farmers' wagons, in which it is hauled to the local market, to railroad cars for shipment to the terminal markets beyond the State as rapidly as carload lots of one grade of grain are accumulated and cars for loading can be obtained. At the terminal markets terminal elevators of great capacity have necessarily been gradually built up to receive and hold this grain until it is milled or exported. The aggregate elevator capacity in Minneapolis is fifty-six million one hundred fifty thousand bushels, and at Duluth, thirty-six million three hundred twenty-five thousand bushels, making a total elevator capacity at the Minnesota terminals of ninety-two million four hundred seventy-five thousand bushels. Thus not only does this vast interstate commerce exist, but, in order to provide facilities for it, enormous permanent investments have been made and thousands of persons are actively engaged in carrying it on.

The price paid for wheat in North Dakota is based on the Minnesota terminal market price. This fact is known to sellers and cards showing such price basis are generally posted in North Dakota country elevators. The "Margin" referred to in the North Dakota Statute is the difference between the Minnesota terminal market price and the price paid at the country elevator in North Dakota less freight to the terminal market.

STANDARDS FOR GRADING GRAIN IN NORTH DAKOTA PRIOR TO THE ESTABLISHMENT OF THE FEDERAL AND NORTH DAKOTA

STANDARDS.—Long prior to 1916 Minnesota had provided for the establishing of standard grades for grain known as "Minnesota Grades." The State Board of Grain Appeals annually, at the beginning of the crop movement season, established and published such grades to apply during the ensuing season. A Grain Inspection Department was created with a force of Inspectors charged with the duty of grading grain. It had as well a State Grain Weighing Department. In the exercise of its police power over public elevators it required that all grain received in such elevators for storage be inspected and graded by a State Inspector and reinspected when it was delivered out of the elevators. Section 4442, General Laws of Minnesota 1913, provides:

> "Inspection. All grain received at a terminal warehouse shall be inspected and graded by a State Inspector, and reinspected in like manner upon delivery from such warehouse. The charges for such inspections shall be paid by the warehouseman and added to the storage, and the Chief Inspector may recover such charges from the warehouseman."

This Minnesota Statute is similar to the Missouri Statute involved in *Merchants' Exchange v. Missouri*, 248 U. S. 365. Like Statutes exist in practically all the grain producing states and no longer is there any doubt as to their validity. The storage and handling of grain for others is a business affected with a public use and its regulation is within the police power of a state. Such Statutes are designed to protect the public from fraud and imposition.

Because the bulk of the North Dakota wheat moved to Minnesota and was sold at the Minneapolis and Duluth terminal markets according to Minnesota grades, naturally buyers of grain for the Minnesota terminals bought it in North Dakota according to these grades. This was the general practice although some buyers used "card grades" containing certain grades of wheat which were not official "Minnesota Grades." Of course, grain so bought was not actually inspected in North

Dakota by a Minnesota Inspector, but the buyer and seller would agree that a quantity of wheat brought to a North Dakota elevator for sale was No. 1 or No. 2, or some other defined Minnesota grade, and would then agree to buy and sell at the price which was the going price for that grade of wheat.

But the Minnesota Statute had no application to the business of buying grain and did not require that all grain bought and sold in the State should be first graded or that grain must be bought or sold according to "Minnesota Grades." The State established and defined the grades and it furnished the facilities for making a State inspection at a prescribed fee. Naturally in order to make trading in grain exact and definite at the Minnesota terminals, grain buyers as well as elevator owners bought and sold grain as of a certain Minnesota grade, according to State inspection. Under such sales, if, on appeal, the grade was changed, a corresponding price adjustment could be made. In contracts for future delivery of grain, the Minnesota grade was adopted as affording an accurate and dependable description of the kind of grain to be delivered under the contract and the Minnesota inspection was adopted as final evidence of the grade. These grades and this inspection were not only recognized at Minnesota terminals, but generally in other terminal markets as well as in the country markets. This general acceptance of Minnesota grades, however, was not under attempted compulsion of the Minnesota Statute. The only Statute attempting to compel acceptance of local State grades to which our attention has been directed, other than the North Dakota Statutes, is a Wisconsin Statute, Chapter 19, Laws of Wisconsin 1905, as amended Chapter 12, p. 19, Sp. Sess. Laws 1905. This law was held invalid as an interference with interstate commerce in *Globe Elevator Co. v. Andrew,* 144 Fed. 871, affirmed 156 Fed. 664. The applicability of this decision to the North Dakota Statute, as well as the inapplicability of the decision on the Missouri Warehouse Statute will be discussed later.

In 1916 Congress enacted the United States Grain Standards Act, being Part B of the Agriculture Appropriation Act of August 11, 1916, Chapter 313. This Act authorized the Secretary of Agriculture to establish grain standards or grades. Pursuant to this authority, Service and Regulatory Announcement Number 33, promulgated April 13th, 1918, effective July 15th, 1918, established official grain standards for wheat and shelled corn and Announcement Number 46, promulgated March 15th, 1919, effective June 16th, 1919, established official grain standards for oats.

After the passage of the Federal Act, the Legislature of North Dakota in its 1917 Session passed a Grain Grading and Inspection Statute. This Act, one provision being eliminated, was sustained as valid by the Supreme Court of North Dakota (*State, ex rel. Gaulke v. Turner*, 164 N. W. 924). We are not concerned with the correctness of that decision because in 1919 the State Legislature passed another and essentially different Marketing, Inspection and Grading Statute and expressly repealed the 1917 Act. This latter Statute, Chapter 138 of the 1919 Laws, is the Act which was declared invalid in *Lemke v. Farmers Grain Company of Embden*, 66 L. Ed. 273, and *Lemke v. Homer Farmers Elevator Company*, 66 L. Ed. 280.

After the invalidity of the 1919 Act had been definitely and conclusively determined, the present Act was initiated and submitted to the electorate of North Dakota on November 7th, 1922, and was adopted, and this is the Act which is brought in question by the present case.

For convenience in comparing the terms of the two Acts, we have printed below the full text of the 1922 Act and the important portions of the 1919 Act in such manner as to indicate readily a comparison of the specific provisions of each Act bearing on any particular point, and have printed in bold type those portions of the two Acts which have a direct bearing on the questions here involved.

THE NORTH DAKOTA GRAIN GRADING ACT OF 1922.

An act declaring the purpose of the state of North Dakota to supervise and regulate the marketing of farm products; preventing unjust discrimination, fraud and extortion in the marketing of same; establishing a system of grading, weighing and measuring farm products; defining the scope and manner of such supervision and the powers and duties of the persons charged with same; **providing for licensing buyers, solicitors,** and warehouses handling such farm products; and making an appropriation therefor.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF NORTH DAKOTA:

Section I. **For the purpose of encouraging, promoting and safeguarding agriculture, commerce and industry, and preventing confiscation of dockage, unjust discrimination, fraud and extortion in the marketing of all kinds of grain, seed and other agricultural products,** we, the people of the state of North Dakota do hereby establish a uniform system of grading, weighing and measuring all kinds of grain, seed and other farm products, and this act shall be known as the "North Dakota Grain Grading Act."

Section II. The Board of Railroad Commissioners of the state, on or before the 8th day of December, 1922, shall appoint for a term of four years, a supervisor of grades, weights and measures, who shall be an expert in the grading, weighing and measuring of all kinds of grain, seeds and other agricultural products; and such supervisor shall immediately assume the duties of his office and shall receive a salary of $3,600 per annum. In case of death, resignation or inability of such supervisor, the vacancy shall be filled in like manner for the unexpired term, and thereafter such supervisor shall be appointed in like manner.

Section III. The State Supervisor of Grades, Weights and Measures shall maintain his office and principal place of business at the Agricultural College of this

THE NORTH DAKOTA GRAIN GRADING ACT OF 1919.

(Extracts.)

Sec. 1. The Governor of the State of North Dakota, on or before the 30th day of June, 1919, shall appoint for a term of four years a member of the faculty of the North Dakota Agricultural College (who shall be an expert in the grading and weighing of all kinds of grain, seeds and other agricultural products) to be the State Inspector of Grades, Weights and Measures, who shall receive, with the approval of the State Board of Regents, the sum of One Thousand Dollars per annum.

state, and shall make and enforce such orders, rules and regulations as are necessary to carry out the provisions of this act. It is hereby made the duty of all of the departments of the Agricultural College (and especially of the State Experiment Mill at said College), to assist and co-operate with the State Supervisor of Grades, Weights and Me. sures in analyzing and testing all kinds of grain, seeds and other farm products for the purpose of establishing just and uniform grades, weights and measures for same.

Section IV. It shall be the duty of the State Supervisor of Grades, Weights and Measures to fix and establish as soon as may be after the enactment hereof for the purpose of preventing fraud and wrongful handling of grain, seed and other farm products, and protecting the producers of the same in connection with the marketing thereof, grades, weights and measures for all kinds of grain, seed and other farm products and he shall prescribe standards of quality and conditions of same, and shall in a general way investigate and supervise the marketing of same with a view of preventing unjust discrimination, unreasonable margins of profit, confiscation of valuable dockage, fraud and other unlawful practices; provided however that whenever the Secretary of Agriculture of the United States has established grades, weights and measures, or any standards of quality and condition of any grain, seed and other agricultural products under the United States Grain Standards Act, such grades, standards of quality and condition, weights and measures shall become the grades, standards of quality and conditions, weights and measures of this state. In establishing such grades, weights and measures, the value of dockage shall be considered and the buyer shall not be permitted to retain same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(c) To establish uniform grades for grain, seeds or other agricultural products for the State of North Dakota with power to alter and modify such grades;

(d) To establish uniform grade certificates used in the marketing of grain, seeds, or other agricultural products;

(f) To conduct investigations into all matters directly or indirectly connected with or bearing upon the marketing, grading and weighing of all grain, seeds and other agricultural products with power to summon, subpoena and compel the attendance of witnesses, and the production of books and papers, and administer oaths whenever it may be necessary for more effective discharge of his duties, and shall have the power to punish for contempt.

(i) To establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills;

Sec. 3. It shall be the duty of the Inspector of Grades, Weights and Measures to proceed at once to define and establish uniform grades and weights for grain, seeds or other agricultural products, also for flour meal and products made therefrom, either singly or combined. In establishing such grades, dockage shall be considered as being of two classes, first, that having value, and second, that having no value, the former to be considered and paid for at its market value.

Section V. That whenever grades, weights and measures shall have been fixed and established under the provisions of this act for any grain, seed or agricultural products by the State Supervisor of Grades, Weights and Measures, or by the Secretary of Agriculture of the United States, then **no person thereafter shall buy by grade any such farm product unless it shall have been inspected and graded by an inspector licensed under the provisions of this act, or under the provisions of the United States Grain Standards Act, and the grade by which it is bought be one of the grades fixed and recognized under the provisions of this act;** provided, that any person may buy any such products by sample or by type or under any name, description or designation which is not false or misleading and which name, description or designation does not include in whole or part the terms of any official grade or grain standard established or recognized by this act. Nothing herein shall prohibit producers from buying grain, seed or other agricultural products from one another.

Section VI. **The State Supervisor of Grades, Weights and Measures shall issue a license to grade to any person engaged in soliciting, buying, weighing and inspecting or grading grain, seeds or other agricultural products, or to the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill handling agricultural products,** provided that such buyer, solicitor or agent shall pass such reasonable examination as to his competency as may be prescribed by the State Supervisor of Grades, Weights and Measures. **The condition of such license shall require such person to honestly and correctly fix grades and dockage of grain and seed inspected at their respective places of business and to honestly and correctly weigh the products so inspected and graded according to the provisions of this act and the rules and regulations made hereunder.**

Sec. 14. **It shall be unlawful for any person to buy or grade grain, seeds or other agricultural products who is not licensed as a Deputy Inspector of Grades, Weights and Measures. It shall be unlawful for any person or persons, corporation or association operating a public warehouse to purchase, weigh, grade or inspect grain, seeds or other agricultural products without first procuring a Deputy Inspector of Grades, Weights and Measures' license,** provided, however, that this section shall not prohibit State Deputy Inspectors from inspecting, weighing and grading grain, seeds and other agricultural products under the direction and supervision of the State Inspector of Grades, Weights and Measures. Provided further that this section shall not prohibit producers from buying and selling grain, seed and other agricultural products to one another.

Sec. 15. **... erson may without a license ... ny grain, seeds or other agr... ural products that have been graded, inspected and weighed by a Deputy Inspector of Grades, Weights and Measures, or State Deputy Inspector of Grades, Weights and Measures.**

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(b) To issue licenses to warehouses, buyers and solicitors of grain, seeds and other agricultural products;

Sec. 11. **The State Inspector of Grades, Weights and Measures may issue a license to any person engaged in buying, weighing and inspecting or grading grain, seed or other agricultural products or the buyer or agent of a privately or publicly owned warehouse, elevator or flour mill,** provided, that such buyer or agent shall pass such examination as to his competency as may be prescribed by the State Inspector of Grades, Weights and Measures. **The condition of such license shall require such Deputy Inspectors of Grades, Weights and Measures to fix grades and dockage of grain and seeds inspected at their respective**

Section VII. **The State Supervisor of Grades, Weights and Measures may suspend or revoke any license issued by him under this act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has short-weighted or has taken for his own use valuable dockage without compensation, or has issued any false certificate of grading or has violated any of the provisions of this act or of the United States Grain Standards Act.** Upon such suspension or revocation, if the licensee is not satisfied with the decision of the State Supervisor of Grades, Weights and Measures, he may appeal to the District Court of his county and have such order reviewed. All licenses issued under this section shall terminate on the 30th day of June each year. Each person receiving such license shall cause same to be conspicuously posted at his place of business, provided that any person may without a license and according to provisions of the United States Grain Standards Act and the rules and regulations promulgated thereunder by the Secretary of Agriculture buy by grade any grain, seed or other agricultural products that have been graded as provided by this act.

Section VIII. **A state warehouse license must be obtained through the State Supervisor of Grades, Weights and Measures for each and every public warehouse handling grain, seed or other farm products in the state. License fee for such warehouse to be fixed by the State Supervisor of Grades, Weights and Measures, and shall not exceed $1.00 for each 1,000 bushels capacity of such warehouse.** The license thus obtained shall be posted in a conspicuous place in such warehouse and shall expire on the 30th day of June each year following the issuance thereof.

places of business and correctly weigh the products so inspected and graded according to the provisions of this Act and the rules and regulations made hereunder. The State Inspector of Grades, Weights and Measures may issue a license to any person engaged in soliciting or procuring consignments of grain, seeds or other agricultural products, providing that such solicitor shall pass such examination as to his competency as may be prescribed by the State Inspector of Grades, Weights and Measures. **The condition of such license shall require such solicitor to comply with the provisions of this Act and all rules and regulations established by the State Inspector of Grades, Weights and Measures. The State Inspector of Grades, Weights and Measures may suspend or revoke any license issued by him under this Act whenever after investigation he shall determine that such licensee is incompetent or has knowingly or carelessly graded grain improperly or has issued any false certificate of grading or has violated any provision of this Act or the rules and regulations made hereunder.** All licenses issued under this section, unless revoked as herein provided, shall terminate on the 30th day of June each year. Licenses shall not be transferable without the consent of the State Inspector of Grades, Weights and Measures.

Sec. 12. The State Inspector of Grades, Weights and Measures shall collect a fee of $10.00 for each license issued under the provisions of Section Eleven of this Act.

Sec. 26. **A state warehouse license must be obtained through the State Inspector of Grades, Weights and Measures for each and every public grain warehouse in operation in this state.** No license issued under this article shall describe more than one warehouse or grant permission to operate any other warehouse than the one therein described. **The license fee is hereby fixed at Eight Dollars for warehouses of a capacity of 12,000 bushels or less and Ten Dollars for warehouses of a capacity of over 12,000 bushels and not to exceed 25,000 bushels, and**

Section IX. It shall be the duty of the Supervisor of Grades, Weights and Measures to inspect public warehouses handling grain, seed or other farm products and to establish and alter rules and regulations for handling, storing, weighing, grading and inspecting such farm products and he shall require the proprietor, lessee or manager of any such public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this state, who does not pay cash in advance for the grain so bought, to file with him a bond, running to the state, with good and sufficient surety in an amount sufficient to cover the value of all farm products bought and not paid for in cash and in addition thereto, he shall require a bond from such public warehouse in a penal sum of not less than five thousand dollars, as in his discretion he may deem fit for the faithful performance of their duties as public warehousemen, and the compliance with all of the laws of this state in relation thereto.

Twelve Dollars for all warehouses over 25,000 bushels and not to exceed 50,000 bushels, and Twenty Dollars for all warehouses over 50,000 bushels and not to exceed 80,000 bushels capacity for each public grain warehouse. Before issuing any such license, the State Inspector of Grades, Weights and Measures shall collect from the person applying therefor the license fee required herein.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(h) To inspect public warehouses and to establish, amend, and alter rules and regulations for handling, storing, weighing, grading and inspecting grain, seed and other agricultural products and for the management of public warehouses for the purpose of carrying out the provisions of this Act or any other law in this state in regard to the same, provided, that all such rules shall be published by the State Inspector of Grades, Weights and Measures in such manner as to give the greatest publicity thereof;

Sec. 22. **The proprietor, lessee or manager of any public warehouse, elevator or flour mill, or any individual buying or shipping grain for profit in this state, and who does not pay cash in advance for the grain so bought shall file with the State Inspector of Grades, Weights and Measures a bond, to the state with good and sufficient sureties, to be approved by the Inspector of Grades, Weights and Measures in the penal sum of not less than Five Thousand Dollars nor more than Seventy-five Thousand Dollars, in the discretion of the State Inspector of Grades, Weights and Measures conditioned for the faithful performance of their duties as Public Warehousemen and the compliance with all the laws of this state in relation thereto.** Only one bond need be given for any line of elevators, mills or warehouses owned, controlled or operated by one individual, firm or corporation. Such bond shall specify the location of such elevator, mill or warehouse operated by such individual, firm or corporation and shall be in an amount sufficient to protect the

Section X. **And it shall be the duty of every public warehouseman in this state to keep a record of the names and addresses of their respective warehouses, elevators or mills; the price paid for agricultural products, the grades given; the price received and the grades received at the terminal markets or within the state, which information shall be furnished to the Supervisor of Grades, Weights and Measures upon written request.**

Section XI. **In case of any dispute as to grades, weights or measures between the producer and the purchaser, operating a public warehouse, elevator or flour mill, handling agricultural products, then a sample shall be taken from such farm product, and shall be sent to the Supervisor of Grades, Weights and Measures, and the proper grade, weight or measure shall be determined by him under such rules and regulations as he may establish.**

Section XII. It shall be unlawful for any person to grade grain, seed or other agricultural products who has not been licensed by the Supervisor of Grades, Weights and Measures or who does not hold a license to grade, weigh or measure grain seed or other agricultural products under the United States Grain Standards Act. And it shall be unlawful for any person or persons, corporation or association to operate a public warehouse, or to grade grain, seed or other agricultural products without first securing a license from the Supervisor of Grades, Weights and Measures, provided, however that this section shall not prohibit any such person from buying such agricultural products if they have first been lawfully graded or provided he buys them by samples as otherwise provided for herein.

Section XIII. **To accomplish the purpose of this act the State Supervisor of Grades, Weights and Measures may employ such deputies, assistants, accountants, expert agents and servants as in his judgment he deems necessary,** holders of the outstanding grain tickets.

Sec. 20. **It shall be the duty of all Deputy Inspectors of Grades, Weights and Measures to keep a record showing the name and addresses of patrons of their respective warehouses, elevators or mills; the prices paid for agricultural products; the grades given; the prices received and the grades received at terminal markets or within the state. This information shall be furnished the State Inspector of Grades, Weights and Measures upon written demand thereof.**

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(e) **To hear and determine appeals from the decision of State Deputy Inspectors and from Deputy Inspectors of Grades, Weights and Measures;**

Sec. 19. The State Inspector of Grades, Weights and Measures shall receive, hear and determine all appeals from the decision of all State Deputy Inspectors and from all Deputy Inspectors. All such appeals shall be heard and determined by the State Inspector of Grades, Weights and Measures under such rules and regulations as he may establish therefor and he shall consider the flour and bread producing qualities of such grain where such final decision is necessary. It shall be the duty of Deputy Inspectors of Grades, Weights and Measures to post a copy of this section in a conspicuous place in their respective places of business and to call the same to the attention of all persons dissatisfied with any decision.

Sec. 2. The State Inspector of Grades, Weights and Measures shall have the power and is hereby directed:

(g) To employ such deputies, experts, accountants, clerks and all other employees necessary to carry out the provisions of this

and he shall define the duties and designate the titles and fix the compensation and bonds of such persons so engaged, the total compensation of such appointees and employees, together with the other expenditures for the operation and maintenance of the Department of Grain Grading, shall remain within the appropriation and the funds received from the licensing of elevators, warehouses and mills handling agricultural products available each year for such purpose; and the Supervisor of Grades, Weights and Measures may remove any such deputies, assistants, accountants, expert agents and servants whenever in his judgment the public interests require it, **and he may do any and all such other acts as are necessary to carry out any and all of the provisions of this act.** And it shall be the duty of the Attorney General of the state and his assistants and all of the state's attorneys of the various counties of the state to prosecute any violations of any of the provisions of this act upon complaint made to them in writing by the State Supervisor of Grades, Weights and Measures.

Act with power to fix and determine the compensation and bonds of all such deputies, experts, accountants, clerks and other employees;

Section XIV. **The salary of the Supervisor of Grades, Weights and Measures shall be paid out of the grain grading fund,** and he shall give bond to the state in the sum of ten thousand dollars.

Section XV. Any person who assaults or in any way resists any officer or employee of the North Dakota Grain Grading Department in the execution of his duties, or who violates any of the provisions of this act shall be guilty of a misdemeanor.

Sec. 30. Any person who forcibly assaults, resists, impedes or interferes with the State Inspector of Grades, Weights and Measures or any employee of the State of North Dakota in the execution of any duties authorized to be performed by this Act, shall upon conviction thereof be fined not less than $50.00 nor more than $100.00 or be confined in the county jail not less than fifteen days or more than thirty days, or both such fine and imprisonment.

Section XVI. **There is hereby appropriated for the purpose of carrying out the provisions of this act out of any of the general funds of the State Treasury the sum of ten thousand dollars, together with all moneys in the State Treasury known as the State Grain Grading Fund, and all fees for licenses collected under the provisions of this act shall be turned**

Sec. 31. All money in the State Treasury known as the State Grading and Weighing Fund are hereby appropriated for the purpose of carrying out the provisions of this Act, and shall be disbursed on vouchers issued by the State Inspector of Grades, Weights and Measures. All fees and licenses collected by the State Inspector of Grades, Weights and Measures

into the State Treasury and designated as the North Dakota Grain Grading Fund, and when so turned in and designated, it shall be appropriated and available for the purpose of carrying out all of the provisions of this act.

Section XVII. **All of the duties and obligations which were formerly performed by the State Inspector of Grades, Weights and Measures, and all of the obligations placed upon him by law, are hereby transferred and made part of the duties of the Supervisor of Grades, Weights and Measures;** and all acts or parts of acts in conflict with any of the provisions of this act are hereby expressly repealed.

shall be turned into the State Public Grain Grading and Weighing Fund, and the salaries and compensation of the State Inspector of Grades, Weights and Measures, Chief Deputy Inspector of Grades, Weights and Measures, Chief Elevator Accountant and all other Deputies, Inspectors, Accountants, Experts, clerks and employees, and all other expenses shall be paid out of this fund; provided such salaries, compensation and other expenses shall not exceed the sum of $35,000 per annum.

Immediately after the passage of the 1922 Act, the present proceeding was instituted, but not before one John N. Hagan was appointed by the Board of Railroad Commissioners of the State of North Dakota as State Supervisor of grades, weights and measures, pursuant to the provisions of the 1922 Act, according to the allegations of the defendants' answer. The injunction granted therefore ran against said John N. Hagan as well as the defendants named in the case.

It is not necessary to go outside of the Act itself to discover the purpose, force and effect of it. The preamble expressly states that *it is the purpose of the State of North Dakota to supervise and regulate the marketing of farm products,*—this in the face of the decision of this Court to the effect that under the circumstances existing in the grain trade in North Dakota, the marketing of the crop is an inherent part of interstate commerce in grain; the object of the Act is *to prevent unjust discrimination, fraud and extortion in the marketing of farm products and to establish* a system of grading, weighing and measuring farm products and *to prohibit the purchase of such products by grade, excepting subject to State control and supervision,*—and this in the face of the Federal Grain Standards Act, providing for Federal control and regulation of such purchases; and the further purpose of the Act is *to provide for li-*

censing buyers, solicitors and warehouses handling farm products,—and this in the face of the repeated declarations by this Court and other Federal Courts, that buyers of grain in North Dakota are engaged in interstate commerce. In addition to the preamble, the entire Act is replete with indications of a *purpose on the part of the State of North Dakota to accomplish identically the same result in respect to the control, regulation and supervision of the purchase of grain in interstate commerce, as the 1919 Act was designed to accomplish.* The most glaring and daring example of this is in the last section of the Act, whereby the Supervisor of grades, weights and measures is invested with "all the duties and obligations which were formerly performed by the State Inspector of grades, weights and measures and all of the obligations placed upon him by law," although the office of State Inspector of grades, weights and measures was the office created by the 1919 Act, and subject to the duty and obligation of enforcing that Act.

MARGINS.—The price paid for grain at the country market in North Dakota is based on the market price at the terminal markets in Minneapolis and Duluth, Minnesota. The difference between the market price at the terminal market and the price paid at the country market less freight is known as the margin. It follows that the regulation or supervision of margins which the elevator is permitted to pay fixes the price of the grain purchased and the profit accruing to the purchaser. If the margin is too small to cover necessary expenses, the transaction necessarily results in a loss. The term margin of profit has a recognized and established meaning in the grain trade, and the attempt in the 1919 Act to confer on the State officials the power to regulate margins of profit was one of the serious defects in that Act. In the new Act, the attempt has been made to accomplish this identical result, although the precise terminology of the former Statute has been studiously avoided. The authority now conferred on the State officials is fully as broad in this respect as the authority conferred by

the 1919 Act. The new Act makes it the duty of the State Supervisor of grades, weights and measures to "*investigate and supervise the marketing of same (grain, seed and other farm products) with a view of preventing * * * unreasonable margins of profit*" and in addition confers upon the Supervisor of grades, weights and measures all the duties and obligations which were formerly performed by the State Inspector of grades, weights and measures, one of which was "to establish a reasonable margin to be paid producers of grain by warehouses, elevators and mills." The new law therefore, in terms, authorizes the State officials to fix the price at which grain shall be bought, if bought at all, in the State of North Dakota and such a Statute is a clear violation of the commerce clause of the Federal Constitution as applied in *Lemke v. Farmers Grain Company of Embden, supra.*

DOCKAGE.—The new law, like its predecessor, requires that, regardless of the agreement between the buyer and the seller, and regardless of the price paid for the grain, the buyer must either separate the dockage from the grain by screening it and return the dockage to the seller, or make to the seller a specific payment for the dockage. The provisions of the new law are even more exacting on this point than were the provisions of the former Act. The 1919 Statute provided that "dockage shall be considered as being of two classes, first, that having value and second, that having no value, the former to be considered and paid for at its market value" whereas the new Act provides that "in establishing such grades, weights and measures, the value of dockage shall be considered and the buyer shall not be permitted to retain same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer."

It is a recognized fact that in the absence of any statutory provision regarding dockage, grain containing dockage commands a higher price on that account. This is true at the country markets, and also at the Minnesota terminals.

It cannot be assumed that the State officials of North Dakota will place upon the provisions of the new Act, any interpretation other than that which was placed upon the provisions of the 1919 Statute and under that Statute all buyers of grain in North Dakota were compelled to make to the farmer a specific payment for his dockage, or to return to the farmer a like amount of dockage. Furthermore, as interpreted by the State officials, the price to be paid for dockage could be dictated by the seller. Such interference with the purchase of grain in interstate commerce is a direct regulation of that commerce, and in this respect there is no possible distinction between the present law and the former Statute which has already been declared unconstitutional by this Court.

LICENSE.—The new Act is an ingenious and studied attempt to compel grain buyers to pay for the expense of enforcing the Act without in terms requiring a license fee from them. Under the 1919 Act, the express imposition of a license fee on grain buyers was one of the objectionable features of the law. Under the new Act, the same result is accomplished by increasing the warehouse license fee sufficiently to provide fees for the enforcement of the Act. The practical effect of this is to collect from grain buyers this excess warehouse fee.

From a comparison of the warehouse fees provided for by the 1922 Act with the fees under previous Statutes which have proven ample to support legitimate warehouse Statutes, it is obvious that there is a large excess which will be available under the new Act which is not needed and will not be used for the enforcement of the legitimate North Dakota warehouse Statutes, and the 1922 Act frankly admits that this excess will be applied to enforce the control, which by the terms of this Act, the State of North Dakota undertakes to exercise over the marketing of grain in interstate commerce.

Prior to the 1922 Act, the average warehouse fee was $6.00 per year for each warehouse and the fees available from this source were ample to take care of the administration of the

rules and regulations governing the operation of warehouses. The average capacity of country elevators in North Dakota is approximately thirty thousand bushels. Under the 1922 Act, a fee of $1.00 per one thousand bushels of capacity is authorized, or in other words, an average of $30.00 per year per warehouse. The difference, namely $24.00 per year per warehouse, is in effect and in fact to be paid under the 1922 Act as a fee for the buyer's license, although nominally imposed as a warehouse fee. The 1922 Act, in substance therefore, does not differ from the 1919 Act in this respect any more than in any other respect.

Conflict Between State and Federal Acts.

Although the North Dakota Act provides for the adoption of Federal standards and grades, the actual and important duties performed under the two Acts are performed by different officials and all the grain bought in North Dakota and shipped and marketed in Minnesota will necessarily be subjected to two distinct inspections, each made by different inspectors acting under different authorities and different rules and regulations and subject to different control.

It is clear that although in terms, the Act does not require that grain be graded by employees of the elevator companies, this is necessarily the fact and is assumed and admitted throughout appellants' brief. As the grain trade is conducted in North Dakota and throughout the Northwest for that matter, the managers of the country elevators are the only persons available for the purpose of inspecting and grading grain. Under the 1922 North Dakota Act, grain purchased in North Dakota will necessarily be graded by employees of the elevator companies. Such persons are not competent to become Federal Inspectors under the Grain Standards Act.

The United States Grain Standards Act, Section 7, provides that the Secretary of Agriculture shall issue licenses to per-

sons duly authorized to inspect and grade grain under the laws of states having a grain inspection department. This provision was inserted for the obvious purpose of taking advantage of existing State Warehouse Acts, providing for impartial and disinterested State Inspectors, because it is further provided:

> "that no person licensed by the Secretary of Agriculture to inspect or grade grain or employed by him in carrying out any of the provisions of this Act shall, during the term of such license or employment, be interested financially or otherwise, directly or indirectly, in any grain elevator or warehouse, or in the merchandising of grain, nor shall he be in the employment of any person or corporation owning or operating any grain elevator or warehouse."

This proviso expressly prohibits the exact situation which would exist under the 1922 North Dakota Act.

The possibility of confusion arising from dissimilar standards which existed under the 1919 Act is avoided by the provision of the new law that where the Secretary of Agriculture has established grades under the United States Grain Standards Acts, these grades shall be adopted as the North Dakota grades, but the confusion and interference incident to a dual inspection is clearly not avoided because the dual inspection necessarily exists so long as the two Statutes are in force. Furthermore, under the 1919 Act, North Dakota did in fact adopt the Federal grades. The situation in this respect is therefore the same as it was under the 1919 Act.

The grading of grain is not an exact science and cannot be done with mathematical accuracy, but necessarily involves the exercise of judgment and opinion on the part of those making the inspection. Competent and experienced inspectors will frequently give to the same grain different grades because of the difference in the judgment and opinion of the individuals. This is clearly illustrated by Exhibit A attached to the defendants' answer in this case (Rec., p. 36), which shows that even in the absence of any Grain Grading Act in North Dakota, the grades which the elevator managers give to grain vary considerably

from the grades which are ultimately given to the same grain at the terminal markets. One obvious reason for this situation is that the buyer at the country elevator, because of the keen competition between elevators, is anxious to procure the grain and tends for this reason to give it a higher grade than it actually deserves. The result is that grain is invariably graded lower at the terminal markets than at the country elevators, even in the absence of any State Grain Grading Act.

THE STATE ACT TAKEN IN CONNECTION WITH SECTIONS 3107, 3113, OF THE NORTH DAKOTA 1913 COMPILED LAWS, REQUIRE A TRANSACTION EXPRESSLY PROHIBITED BY THE FEDERAL STATUTE.

Section 3107 defines a public warehouse as an elevator operated "for the purpose of buying, selling, storing, shipping or handling grain for profit." Section 3113 is as follows:

> "What Storage Receipts Shall Express. Each storage receipt issued in this state shall expressly provide that at the option of the holder of such receipt the kind, quality and quantity of grain for which such receipt was issued shall be, on his demand, delivered back to him, at any terminal point or at the same place where it was received upon the payment of a reasonable charge per bushel for receiving, handling, storage and insurance charges; and in case of terminal delivery the payment, in addition to the above, of the regular freight charges on the gross amount called for by the tickets being surrendered—such charges to be fixed by express terms in the storage receipt at the time of receiving the grain at the elevator or warehouse, and at the time of issuing the receipt, but no charges shall be made for cleaning grain unless such grain has been actually cleaned. Nothing in this section shall be construed to require the delivery of the identical grain specified in the receipt so presented, but an equal amount of the same grade of grain or in lieu thereof a receipt issued by a bonded warehouse or elevator company doing business at terminal points, for an equal amount of grain of the same grade; provided, that grain placed in a special bin be excepted from the provisions of this section."

These sections were not repealed by either the 1919 Act or the 1922 Act. Under the State law, therefore, a person can take grain to any country elevator and have it inspected and graded by the State Deputy Inspector. Necessarily the grade given the grain will be one of the United States standard grades. He may store this grain and the elevator operator is required to give him a receipt for the amount of grain so stored, designating the grade. This receipt must contain a provision that on the payment of the freight charges to any terminal, the holder is entitled to grain of the same grade at that terminal or a terminal warehouse receipt for such grain. These warehouse receipts may be transferred. By the sale and transfer of the grain covered by the receipt, any one can receive delivery at the Minneapolis terminal of that grain on payment of the storage charges and the freight. The Federal Statute, however, in terms provides that:

> "No person thereafter shall ship or deliver for shipment in interstate or foreign commerce any such grain which is sold, offered for sale or consigned for sale by grade unless the grain shall have been inspected and graded by an inspector licensed under this Act and the grade by which it is sold, offered for sale or consigned for sale be one of the grades fixed therefor in the official grain standards of the United States."

The situation resulting from the conflict between the North Dakota Act and the Federal Act, cannot be judged by an examination of the situation existing in states having admittedly valid Warehouse Statutes of the usual sort. In Minnesota, for instance, Grain Inspectors are impartial and disinterested persons who are not interested in the merchandising of grain and are not employees of any elevator company. When the United States Grain Standards Act was passed and grades for weighing grain and oats were established thereunder, Minnesota, like North Dakota, adopted as the Minnesota standards the United States standards, but in Minnesota, unlike the situation under the North Dakota Act, all State Inspectors author-

ized to grade grain, are qualified to, and do in fact, take licenses as Federal Inspectors. The two systems can therefore operate harmoniously, which cannot be done under the North Dakota Act.

No claim is made by the plaintiff that the United States Grain Standards Act does or could apply to a transaction in grain which was completely intra-state. The announcements by the Secretary of Agriculture of the United States, which are attached to the defendants' answer in this case, illustrate clearly that the Secretary of Agriculture has no inclination to attempt any control or regulation of intra-state transactions in grain. These announcements, however, were issued prior to the decision in *Lemke v. Farmers Grain Company, of Embden*, 66 L. Ed. 273, and are obviously based on a misconception of when interstate traffic in grain commences. They proceed on the assumption that the sale by the farmer to the elevator is not a part of interstate commerce, whereas it has now been definitely determined to be so. In all likelihood the Secretary of Agriculture will now issue and promulgate rules and regulations governing such sales or, if there is any question as to whether or not the United States Grain Standards Act in its present form applies to such sales, Congress will in all likelihood expressly extend it so as to include them.

POINTS AND AUTHORITIES.

I.

THE NORTH DAKOTA STATUTE OF 1922 IS IN VIOLATION OF THE COMMERCE CLAUSE OF THE FEDERAL CONSTITUTION.

The sale of grain by the farmer to the elevator is now definitely conceded to be an integral part of interstate commerce in grain. The 1919 Act has been held to violate the commerce clause of the Federal Constitution because it was "a compre-

hensive scheme to regulate the buying of grain." It was so characterized by this Court in the Lemke case. Nevertheless, the State of North Dakota has frankly and admittedly declared its purpose, "to supervise and regulate the marketing of farm products" by the preamble to the new Act. There can be no question that the purpose of the 1922 Act is identical with that of the 1919 Act, and that it will accomplish the same identical result is obvious when its provisions are compared with those of the 1919 Act in the light of the admitted facts regarding the manner in which interstate commerce in grain is carried on in the State of North Dakota. Since the decision in the Lemke case, the State of North Dakota cannot lawfully control or regulate the sale or marketing of grain in North Dakota, and yet, by the very terms of the preamble to the new Act, this is the sole purpose of the statute now in question.

It is futile to attempt, as the appellants do throughout their brief, to separate the act of grading grain from the transaction by which the grain is sold in interstate commerce. Every argument advanced by the appellants on this proposition was advanced in the Lemke case in an effort to separate the sale itself from interstate commerce.

Leaving out of consideration sales by sample or by type, which are comparatively insignificant in number, and confining our attention to the normal case of a purchase of grain by grade by an elevator from a farmer, and conceding, as the appellants now must, that this purchase is a transaction in interstate commerce, and recognizing what is universally true and what is assumed and admitted by the appellants throughout their brief,—that in substantially every case the grading of grain is merely a means of determining the price to be paid, an incident to and a part of the purchase, the conclusion is inevitable that to control and regulate the transaction by which grain is sold in interstate commerce through a control and regulation of the grading of grain is just as truly an attempt to control and regulate inter-

state commerce as though the sale were in terms and specifically regulated as was the case under the 1919 Act.

It is not helpful to imagine a situation where grain is actually graded as a separate and distinct transaction without relation to its sale, and by parties wholly disinterested. We are dealing with an actual state of facts, and this is not a true picture of the conditions in NorthDakota. The fact is that the grading of grain is the one vital and inseparable incident to its purchase and sale in interstate commerce. It is the means by which the price is fixed. To permit a State to regulate the grading of grain in connection with its purchase in interstate commerce, is just as surely to permit a direct regulation of that commerce as it is to permit the fixing of the price at which grain may be bought in interstate commerce.

If the State of North Dakota, by means of regulations and rules governing the grading of grain at the time of its purchase in interstate commerce, can regulate and control the marketing of grain in interstate commerce, then the commerce clause of the Federal Constitution is meaningless so far as its practical effect is concerned. If the State of North Dakota can exercise the control over interstate commerce which will necessarily result from an enforcement of the 1922 Act after the 1919 Act has been declared unconstitutional, then the protection of the commerce clause of the Federal Constitution becomes a mere matter of phraseology without any practical significance. The purpose of the commerce clause is to prevent the accomplishing of a result, namely, interference with interstate commerce by the various States. Before the adoption of the Constitution, each State regulated all trading in commodities that might be found within its borders. The result is a matter of history. Each State, either in an attempt to obtain an advantage for its own citizens, or for the purpose of retaliation, or for some other selfish reason, regulated and supervised, if it saw fit, both the sale of goods brought into the State and the purchase of

goods within the State for transportation elsewhere. There was no authority which had the power to regulate entire transactions in which more than one State was involved. It was the disastrous effect of this condition on all interstate commerce which was recognized in and responsible for the commerce clause of the Federal Constitution.

If North Dakota can regulate and control the marketing of its grain crop, which, as the appellants insist, is its chief product, Minnesota and Michigan may do the same as to their iron; Pennsylvania and West Virginia as to their coal; the Southern States as to their cotton. In short, each State could control and regulate the marketing of its surplus commodities and the free flow of interstate commerce could thereby be interfered with, and, in fact, wholly destroyed,—a state of affairs identical with that which existed prior to the adoption of the commerce clause and the disastrous effect of which led to its adoption. No precedent can be found for such control and regulation as North Dakota assumes to exercise over the marketing of its grain crop save by going back one hundred and thirty-five years.

Throughout the argument in the Court below, and throughout the appellants' brief here, we are constantly reminded of the contention of the State of North Dakota that control and regulation of the marketing of the grain crop is necessary to the protection of the farmer of North Dakota. The point, however, is not involved in this case. A question far more fundamental is presented, which affects, not merely the farmer of North Dakota, but the citizens of every State in the Union, and the very authority and stability of the Federal Constitution. We do not concede that the claimed evils exist or that the grain grading act is adapted to or intended to remedy such evils if they did exist. We are convinced that the Act is political propaganda and holds out the lure of numerous official positions with salaries paid out of exactions from interstate com-

merce in grain. But, even if the alleged evils did exist, the answer to the contention that they call for control and regulation by the State of North Dakota cannot be better answered than in the words of this Court in the Lemke case.

> "It is alleged that such regulation is in the interest of the grain growers, and essential to protect them from fraudulent purchases, and to secure payment to them of fair prices for the grain actually sold. This may be true, but Congress is amply authorized to pass measures to protect interstate commerce if regulation of that character is needed. The supposed inconveniences and wrongs are not to be redressed by sustaining the constitutionality of laws which clearly encroach upon the field of interstate commerce, placed by the Constitution under Federal control."

If anything other than the language of the Act itself is necessary to show that the one purpose which the Act is intended to accomplish is control by the State of North Dakota of the sale of grain by the farmer to the elevator, we have but to refer to the appellants' brief, which is replete with statements to this effect, and yet this is the very result which was so emphatically condemned by this Court in the Lemke case.

In addition to the fact that the 1919 Act and the 1922 Act are identical in the purpose which they are designed to accomplish and in the practical effect which they will have in practice, the specific provisions of these two statutes are substantially the same. The present law, like the former statute, creates a state officer with supreme authority to supervise and regulate the marketing of grain in North Dakota and delegates to such officer like powers of preventing "unjust discrimination, unreasonable margins of profits, confiscation of valuable dockage" and confers on the state officer the same power to arbitrarily interfere with and control the purchase of grain, to regulate margins of profit, to enforce the alternative of either making a specific payment for dockage of its market value (which market value must ultimately be determined by the state officer and not by the buyer and seller), or to screen the grain and return the

dockage to the producer. The new statute, like the old, in effect requires all buyers of grain to become licensed by the State and requires compliance by them with all rules and regulations of the State as a condition to their obtaining or retaining a license. The new law puts even greater burdens on interstate commerce in grain in the form of license fees and bonds than the old, and in conclusion, to make it certain that no power on the part of the state authorities to regulate, interfere with and burden interstate commerce that existed under the old law is omitted in the detailed provisions of the new, the 1922 Act concludes with the provision (Section XVII).

> "All the duties and obligations which were formerly performed by the State Inspector of Grades, Weights and Measures, and all of the obligations placed upon him by law, are hereby transferred and made part of the duties of the Supervisor of Grades, Weights and Measures; and all acts or parts of acts in conflict with any of the provisions of this act are hereby expressly repealed."

The office of the State Inspector of Grades, Weights and Measures referred to in the section above quoted was created by Chapter 138 of the Laws of 1919, and the duties or obligations of the State Inspector were defined by that law, which was declared unconstitutional in the Lemke case. The attempted exercise of State power which rendered the old law invalid was the exercise of the power conferred on this same State Inspector. It, therefore, appears that the new Act adopts *in toto* the regulatory provisions of the old Act and re-enacts the very law which this Court has declared invalid.

Not only is it clear that the expressed purpose and the necessary effect of the 1922 Act is to vest in the State of North Dakota, complete control and supervision over the marketing of all grain and that in this respect the Act is identical with the 1919 Act, which has already been declared a violation of the commerce clause of the Federal Constitution, but a comparison of the specific provisions of the new Act with those of the

old Act, insofar as they concern the more objectionable features of the old Act, will indicate clearly that no substantial change has been made.

MARGINS.

The 1922 Act, like its predecessor, gives the State authorities the right to regulate and control the marketing of all grain in North Dakota, including the determination of the price which must be paid for grain bought in that State. Under the power thus granted, the movement of grain from the State of North Dakota may be curtailed or even prevented. Section 4 of the Statute which was adopted to replace the unconstitutional 1919 Act, provides that the State Supervisor shall "in a general way, investigate and supervise the marketing of same (grain) with a view of preventing * * * unreasonable margins of profit." Obviously the only way of preventing unreasonable margins of profit is by a determination of a reasonable margin and the adoption of regulations which will prevent grain buyers from making any margin greater than the one so determined. The Act confers on the State Supervisor ample power to enforce his views as to what constitutes a reasonable margin. It is not necessary that the taking of an unreasonable margin should be made a criminal offense. It is sufficient that the State official who is charged with the duty of preventing unreasonable margins, has it within his power to revoke the license of any buyer who does not conform to his views on this subject as expressed in the regulations he may make. Regulation of the margin of profit is necessarily a direct regulation of the very act of buying grain which this Court has definitely determined to be a part of interstate commerce in grain and is therefore beyond the power of the State.

If there were any doubt as to the purpose and effect of the provisions already referred to, as conferring on the State Supervisor the power to regulate margins of profit, Section 17 of

the new Act removes any such doubt. It confers on the State Supervisor "the duties and obligations *which were formerly performed by the State Inspector* of grades, weights and measures and all the obligations placed upon him by law." The office of State Inspector of grades, weights and measures was created by the 1919 Act and the fact that that Act authorized him and made it his duty to establish reasonable margins, was one of the features of that law which was emphasized by this Court in holding it unconstitutional in the Lemke case. The new law not only recites in its preamble that it is designed to accomplish the same end as the law previously declared unconstitutional, but by this last section, brazenly re-enacts practically the entire 1919 Statute.

It is not possible to read into the language of this Section 17 any limitation whatsoever. The draftsmen were not content to confer upon the State Supervisor the duties which were conferred on the State Inspector of grades, weights and measures *by law.* Such a provision might conceivably carry only such duties as were conferred by Statutes which had not been repealed or declared unconstitutional. But the Court will note that in addition to the duties placed upon the State Inspector of grades, weights and measures *by law,* the State Supervisor, under the new Act, is also charged with all the duties and obligations *which were formerly performed by the State Inspector.* This leaves no possible escape from the conclusion that the new Act is designed and intended to substantially re-enact the old law.

LICENSE.

The 1922 Act, like the former law, prohibits anyone from buying grain in North Dakota until such grain has been inspected and graded by someone licensed by the State of North Dakota. This, in practice, requires everyone desiring to buy grain in North Dakota for shipment out of the State to first take out a license from the State and submit to all State rules and regula-

tions. It thereby interferes with and places a direct burden upon interstate commerce.

In this respect, the new Act is identical with the 1919 law with the single exception that no license fee is expressly charged. We have already indicated, however, in the statement of facts that this is simply and obviously a ruse. It is apparent that the administration of this Act will require substantial funds. No provision is made for supplying these funds other than a small initial appropriation and the increase in the warehouse license fee. It will not be disputed that the warehouse license fees will in practically every instance, be paid by the buyers of grain. As the grain trade is conducted in North Dakota, it is invariably the buyer of grain who conducts the grain elevator and warehouse. He therefore occupies a dual capacity and the new Act, by increasing the fee which he is required to pay as a warehouseman, raises funds to enforce against him, as a buyer, the rules and regulations established by the State in an attempt to control the marketing of grain. Under these circumstances, it is idle to contend that the buyer is not required to pay for his license to grade grain.

The new law is, in this respect, so far as its effect and result are concerned, simply a re-enactment of the 1919 Act. It in fact requires as a precedent to buying grain in North Dakota that the buyers shall obtain a license from the State of North Dakota to grade grain and shall then act in conformity to the rules and regulations established by the State, including such rules as may be established relating to margins of profit, payment for dockage and other essential elements in the purchase of grain. It will not be claimed that in practical operation under this Statute, there will be any one at country stations other than the buyers for the different elevators who will be licensed to grade grain. The plan of this Act is just as clearly to license the buyers as was the plan of the 1919 Act. Under the old Act, no grain was graded except by buyers. It necessarily follows that

if a man connected with an elevator desires to buy grain at all from producers at country stations in North Dakota, he must take out a license because there is no other practical way to buy grain. In construing the law, its practical operation must be considered, and, considering it in this manner, the license provisions are a clear and direct burden on interstate commerce.

It has repeatedly been held that a State cannot require a license as a condition to engaging in interstate commerce.

Robbins v. Shelby Taxing District, 120 U. S. 489.

Brennan v. Titusville, 153 U. S. 289.

The Robbins case above, involved a State Statute requiring drummers not having a regular place of business in the taxing district to take out a license from the State. This Statute was held invalid.

In the Brennan case above, the Court had under consideration an ordinance of the City of Titusville requiring persons canvassing or soliciting orders for goods within that city to procure a license. Brennan was taking orders for pictures to be made at Chicago, without a license. He was fined and convicted for violating the ordinance. This Court reversed the decision of the State Court, Mr. Justice Brewer saying in part:

> "It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State; but we think it must be considered, in view of a long line of decisions, that it is settled that *nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free.* * * *
>
> It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible."

This decision refers to a number of the prior decisions of the Court sustaining the principle announced in the Brennan case. In the Brennan case emphasis is placed on the fact that the interstate commerce involved was in unchallenged subjects of commerce, not dangerous to the health, morals or general welfare of the community.

From an examination of these cases and others referred to it is apparent that the line between the proper exercise of the police power of the State and an unwarranted interference with interstate commerce can only be drawn after a reference not only to the provisions of the Statute but to the subject matter involved. It further appears that the line must be drawn by the Federal Court and that the State cannot by claiming that a Statute is passed for a purpose within its police power bind the Court having the final right to determine whether in fact the law is an exercise of the police power only indirectly and incidentally affecting interstate commerce or a direct burden on, or an interference with, interstate commerce.

In our case the commerce involved is in grain, especially wheat. Nothing in the nature of the commodity can suggest the necessity of a state police regulation. In this respect it differs from statutes relating to the inspection of livestock or meats, or milk, or prepared articles of unknown ingredients, on which the appellants so largely rely. Even as to State regulations of commerce in these articles the court often determines that the protection of health is remote, and that the interference with commerce is direct and holds the law invalid.

State v. C. & G. W. Ry. Co., 125 Minn. 332.

Minnesota v. Barber, 136 U. S. 313.

The provisions regarding the licensing of buyers and the regulation of the marketing of grain must not be confused with the regulation of the handling of grain in public warehouses. The Statutes of North Dakota, other than the Act here in question, fully regulate and require licenses for the operation of elevators

and public warehouses in that State (Sections 3107, 3112 to 3117, Compiled Laws 1913). They require a person operating a warehouse to pay an annual license fee and furnish a bond conditioned on the faithful performance of his duties as public warehouseman. His warehouse is subject to inspection by the State authorities. Any discrimination in the matter of handling grain in such warehouse is prohibited. Provision is made for the issuance and terms of warehouse receipts and the rates to be charged for storage are fixed. Reports are also required showing the business done by such warehouses. The validity of such provisions is not questioned. They regulate a local instrumentality and only indirectly affect interstate commerce. Thus entirely outside the present Act, which in effect, requires buyers of grain to take out licenses from the State, the State has fully exercised its police power by the provisions which are general throughout the grain growing States and are designed to safe-guard and regulate the handling of grain through public warehouses.

The fact that, in effect, the buyer is compelled by the new law to pay a fee to the State is not the only burden which the provision for a buyer's license places on interstate commerce. The applicant for such a license must satisfy the State Supervisor that he is qualified and competent. On this question, the State Supervisor exercises his discretion in the first instance and may refuse a license. Furthermore, an applicant must agree to abide by all the rules and regulations concerning the marketing of grain, including any regulations which the State Supervisor may establish as to the margin at which the licensee may buy grain and the rule requiring a specific payment for dockage at the seller's price or a return to the seller of a like amount of dockage. The licensee must consent to the forfeiture of his license for a violation of any rules of the State department. Thus the law not only requires as a condition to buying grain in North Dakota, the payment of a license fee and

the taking out of a license, but it requires the licensee in addition, to agree to allow the State to fix a price at which he may buy grain and to interfere with and regulate the manner in which he may engage in interstate commerce in grain. A more direct interference with interstate commerce is inconceivable and cannot be justified as an attempted exercise of the police power of the State.

Dockage.

The present grain grading Statute, like its forerunner, requires a payment specifically for dockage contained in grain, at a price to be fixed by the seller, or the return of a like amount of dockage to the seller. The provision of the new law is even more specific and exacting than the provision of 1919 Act in this regard. Section 4, after providing for the establishment by the State Supervisor of grades, weights and measures, requires that "in establishing such grades, weights and measures, the value of dockage shall be considered and the buyer shall not be permitted to retain same without just compensation. He shall pay the fair market value for same or separate it and return it to the producer."

This provision is a direct interference with the right to contract and the right to purchase grain freely in interstate commerce. This Act was drafted and passed with a full knowledge and understanding of the manner in which the similar provision of the 1919 law had been interpreted by the State authorities. It clearly appeared from the record in the Lemke case that, as so interpreted, the Statute requires absolutely a specific payment for dockage regardless of the contract between the seller and buyer for the sale and purchase of grain and regardless of whether or not, in the price paid for the grain, the value of dockage had been taken into consideration. Even long after grain has been purchased and re-sold, the purchaser may be required to pay the seller for the dockage contained in the grain

at the "local market" price or be required to return to the seller a like amount of dockage. The "local market" price was consistently interpreted to mean the price fixed by the seller so that the purchaser merely has the option to either pay the price demanded by the seller or to return a like amount of dockage, and in case the question is not raised until after the sale is completed, it places the purchaser absolutely at the mercy of the seller. Any law which subjects a purchaser to an obligation to pay an amount which is determined in some manner without consulting him, to be the market value of a product, necessarily interferes with the right to contract and will necessarily interfere with the free purchase and movement of such commodity.

The requirement of a specific payment for dockage is enforceable not only by virtue of the general power conferred on the State Supervisor and the specific provisions of the Statute regarding dockage, but also through the power vested in the State Supervisor to revoke the buyer's license and to prevent a rebellious buyer from continuing his business of buying grain in North Dakota for shipment to and sale in Minnesota. This is clearly an interference with interstate commerce.

The alternative provision that the buyer must return dockage to the seller is even more arbitrary and interferes to an even geater extent with the right to freely engage in interstate commerce in North Dakota grain. This seems too apparent for argument. The only conceivable means of separating the dockage from the grain is by means of expensive cleaning apparatus and machinery. In order to take advantage of this alternative, the buyer must install in his elevator this expensive apparatus. To impose this obligation on the buyer involves a direct and very substantial burden on his interstate business. Furthermore the screening of grain, particularly during the busy season, slows down the handling of grain through the elevator and interferes with its proper and advantageous use by the owner.

No analogy can be drawn between a law requiring a person

buying grain in interstate commerce to screen it as a part of the very transaction of purchase and a law requiring the owner of a coal mine to screen coal before weighing the same. Such an analogy was suggested by Justice Brandeis in his dissenting opinion in the Lemke case. We respectfully submit, however, that there is a real and vital distinction between these situations. The entire process of mining coal is subject to the police power of the State in which it is carried on. It is subject to regulation under this power even though it be a direct and burdensome interference with the operation. It has never been questioned but that the State can regulate the mining of coal within its borders. It can not, however, directly regulate or burden any transaction which is a part of interstate commerce in grain, even though that transaction takes place within its borders.

Bonds.

The present North Dakota Grain Grading Act contains at least one requirement, which it attempts to impose as a condition precedent to the purchase of grain in interstate commerce and which constitutes a direct and burdensome interference with that commerce, in addition to the conditions and burdens imposed by the 1919 Act, namely, the requirements of Section 9, of the 1922 Act that any buyer of grain must furnish a bond running to the State in an amount sufficient to cover the value of all farm products bought by such buyer and not paid for in cash in advance. The grain raising states invariably require from grain elevators, warehouse bonds. In this they are entirely justified on the well recognized principle already referred to that a warehouse is simply a local instrumentality, which is subject to State regulation. No precedent, however, has been found for the attempt on the part of the State of North Dakota to dictate the terms on which a sale of grain in interstate commerce shall be made, which is reflected in the requirement of

the new law that all buyers furnish bonds to protect sellers who see fit to sell on credit.

It is inconceivable that the State of North Dakota should refuse to listen to this Court when it is told that it cannot dictate or directly regulate the terms on which sales of grain are made in North Dakota, and yet that is exactly what the State is doing. In the Lemke case, this Court expressly held that the State of North Dakota could not lawfully determine the price or terms on which grain should be sold in that State, and in spite of this holding, the State has now not only substantially re-enacted the former law, but added to it this provision requiring a bond to protect credit sales.

The practical operation of this provision is manifestly unreasonable. Grain sold and shipped to a buyer at a terminal market with draft attached to the negotiable bill of lading would not be grain purchased and paid for in cash in advance, and yet before a buyer could so purchase grain, he must give a bond to the State of North Dakota to cover the value of such grain. No matter what other security or assurance of payment a buyer may give a seller, this new Statute requires a bond. Such situations are obviously beyond the realm of reason. But whether reasonable or not, the provision for such bond is a most direct and burdensome interference with the free movement of grain in interstate commerce and as such is beyond the power of the State.

THE NORTH DAKOTA STATUTE REQUIRES THE GRADING OF ALL GRAIN BOUGHT OR SHIPPED WITHIN THE STATE SUBJECT TO STATE SUPERVISION. THE BULK OF THIS GRAIN MOVES IN INTERSTATE COMMERCE. THE GRADING OF GRAIN MOVING IN INTERSTATE COMMERCE REQUIRES A UNIFORM RULE. A REQUIRED STATE GRADING INTERFERES WITH INTERSTATE COMMERCE.

In *Globe Elevator Company v. Andrew,* 144 Fed. 871, a Wisconsin Statute requiring all grain sold at Superior, Wisconsin,

to be in accordance with Wisconsin weights and grades was held invalid. To understand the exact question decided in this case, it is necessary to have in mind the situation existing as evidenced by the Minnesota and Wisconsin Statutes as well as the facts stated in the decision. Minnesota by Statute never attempted to *require* that grain should be bought and sold in Minnesota on Minnesota grades. The State established years ago a State Weighing Department and established Minnesota's standard grades of grain and created a State Grading Department. In order to give transactions in grain greater certainty and definiteness *traders in grain voluntarily* bought and sold that commodity according to Minnesota weights and grades. In time these standards were accepted by traders not only in Minnesota but throughout the grain producing states to the West and in the great terminal markets to the East. Superior, Wisconsin, an important lake port receiving large quantities of grain from railroads and shipping it out by boat, became dissatisfied with this customary buying and selling of grain on Minnesota weights and grades and desired the establishment and recognition of Wisconsin weights and grades. Reflecting this attitude of its important grain terminal, the Wisconsin Legislature created a Wisconsin Grain Weighing and Grading Department in 1905 (Laws of Wisconsin 1905, B-37, C-19, as amended by Laws Special Session 1905, B-19, C-12). This Statute *required grain bought and sold in Superior* to be weighed and inspected under the Wisconsin Statute *and prohibited any person from offering for sale or selling or delivering any grain in Superior under the Minnesota grading or under any other grading not provided in the Wisconsin Act.* The decision by the Circuit Court states:

"The important and vital question is whether these statutes are invalid as a regulation of interstate commerce. No doubt, the states are invested with large authority to pass inspection laws, indirectly affecting, and to some extent interfering with, commerce among the states. Many of such laws are not obstructive to commerce, but operate

as an aid or encouragement to it. Such are acts compelling carriers to promptly and safely carry and deliver interstate freight committed to their charge, securing safety in railroads and appliances, regulating bridges, improvement of navigable waters, regulating pilots, state quarantine, etc. *Mobile Co. v. Kimball*, 102 U. S. 691, 26 L. Ed. 238. These laws mostly operate as local aids and instrumentalities of commerce, making it better and safer, and until Congress acts the states have ample power in all such matters, except where the subject admits only of one uniform plan or system, like the regulation of tolls on an interstate bridge, in which case the power of Congress is exclusive. *Covington Bridge Co. v. Kentucky*, 154 U. S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962; *State Freight Tax*, 15 Wall. 243, 21 L. Ed. 146.

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The attempt of the Wisconsin statute to prescribe the standard of sale thus appears to be a regulation of commerce. It interferes with and attempts to destroy the grades on which the purchaser depends in making his purchase and succeeding sale.

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Freedom of commerce would seem to include the power to buy when and where and how the purchaser may choose. This power is burdened and obstructed by the legislation in question, directly conflicting and hostile to that of Minnesota. It interferes with that equality of rights between the states as to such commerce which was the design of the Constitution, not indirectly or remotely, but palpably and in an important and thorough manner. *Veazie v. Moor*, 14 How. 574, 14 L. Ed. 515.

It is also clear to me that so important a matter as fixing the grades by which grain in interstate transportation can be sold, and without which it cannot be sold on any large scale, admits of one uniform system or plan of regulation, and only one, and therefore falls within the exclusive power of Congress. Certainly it cannot readily be bought and sold according to two systems of inspection. It cannot be bought by one and sold by another. Conflicting state systems would only obstruct. *State Freight Tax*, 15 Wall. 243, 27 L. Ed. 146; *Welton v. Missouri*, 91 U. S. 280, 23 L. Ed. 347; *Henderson v. Mayor*, 92 U. S. 273, 23 L. Ed. 543. Like the regulation of tolls on an interstate bridge, the fixing of a standard of sale for grain, moving in interstate commerce admits of only one uniform system.

* * * * * * * * * *

> Wisconsin, it is said, may lawfully take control of the inspection and weighing of grain held for sale, delivery, and storage within her territory, and may prohibit any other system. Assuming this to be so, and that Minnesota cannot rightfully stop and inspect grain in transit, yet the Legislature of Minnesota, in a spirit of rivalry, or desirous of vindicating its inspection system, might resort to retaliation. Wisconsin having made sales of grain void when made in Minnesota, that state might enact that it should be a crime for any person within her borders to sell any grain under the Wisconsin system. Wisconsin not to be outdone, follows with other drastic and ingenious reprisals."

This decision which was affirmed by the Circuit Court of Appeals in 156 Fed. 664, contains an exhaustive discussion of interstate commerce in grain and a comprehensive review of the decisions relating to the police power of the State and the exclusive power of Congress to regulate acts constituting interstate commerce. The discussion and decision in the main are directly applicable to the North Dakota Statute and the questions here involved and the reasoning was adopted as directly applicable to the North Dakota Act of 1919 by the Circuit Court of Appeals in *Farmers Grain Company of Embden v. Langer*, 273 Fed. 635.

Grain moves in interstate commerce through many states. It retains substantially a uniform character and condition throughout the movement. It may be bought and re-sold several times before it reaches its final destination. It seems clear, therefore, that the grading of grain is a subject lending itself to and requiring one uniform regulation. Recognizing this situation, Congress in 1916 passed the United States Grain Standards Act which requires all grain sold or shipped in interstate commerce to be inspected by licensed Federal Inspectors and to be by them graded according to duly established Federal standards.

At the time the Globe Elevator case, *supra*, was decided, the Federal Grain Standards Act had not been passed and yet

Judge Sanborn in that case, held that the attempt of the Wisconsin Statute to *compel* purchases in Wisconsin to be made according to Wisconsin grades was an interference with and a burden upon the usual established course of interstate commerce.

The mere fact that the Federal Government has now established grades cannot justify North Dakota in forcing a distinct system of inspection on interstate transactions.

If it is proper for North Dakota to make a compulsory inspection of grain while it is within the State of North Dakota, it would be equally proper for each state through which that grain comes to rest for transfer or for sale to require an inspection according to the rules of such state. Some plausible reason can always be assigned for a local interference with interstate commerce, but if the evil in fact exists, it does not call for the exercise of a State regulation but for a Federal regulation. It is to a matter requiring a uniform regulation. In matters within the exclusive jurisdiction of Congress it is for Congress to determine when and how the matter should be regulated. The absence of a regulation by Congress is a Federal determination that that regulation is not required. So it was said by Mr. Justice Field in *County of Mobile v. Kimball*, 102 U. S. 697:

> "The subjects, indeed, upon which Congress can act under this power are of infinite variety, requiring for their successful management different plans or modes of treatment. *Some of them are national in their character, and admit and require uniformity of regulation*, affecting alike all the states; others are local, or are mere aids to commerce and can only be properly regulated by provisions adapted to their special circumstances and localities. *Of the former class may* be mentioned all that portion of commerce with foreign countries or between the states which consists in the *transportation, purchase, sale and exchange of commodities.* Here there can of necessity be only one system or plan of regulation, and that Congress alone can prescribe. Its non-action in such cases with respect to any particular commodity or mode of transporta-

tion is a declaration of its purpose that the commerce in that commodity or by that means of transportation shall be free. There would otherwise be no security against conflicting regulations of different states, each discriminating in favor of its own products and citizens, and against the products and citizens of other states. And it is a matter of public history that the object of vesting in Congress the power to regulate commerce with foreign nations and among the states was to insure uniformity of regulation against conflicting and discriminating state legislation."

And *in re Schechter*, 63 Fed. 695, Judge Sanborn states:

"Now, while there are certain subjects in their nature local, such as harbor pilotage, beacons, bridges, etc., regarding which a state may legislate when Congress has not, yet when the subject-matter is the sale of a well recognized article of commerce, such as vines, trees or shrubs, or any other well known article of commerce, the product of another state, the subject is in its nature national, susceptible of regulation by rules uniform throughout the nation, and obviously susceptible of wise regulation by such uniform national rules only; and in such a case there can, of necessity, be only one system or plan of regulation, and that Congress alone can prescribe. In all cases where Congress has passed no law regulating interstate commerce in any well recognized article of commerce, that fact is conclusive evidence that it intends such commerce to be free, and any law of the state which prohibits or restricts it must be held to be in violation of the Constitution.

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This law imposes a restriction upon the sale of foreign grown trees by its very terms; and any law which imposes any vexatious or annoying restriction upon the sale of articles that are themselves sound articles of commerce must be held to be an interference with commerce, and thus in violation of the clause of the Constitution to which I have referred."

The State argues that the Federal inspection does not reach the purchase of grain at the country elevators. This same argument, like all other arguments now advanced by the State, was urged in support of the 1919 Act. Clearly Congress might provide any additional inspection of grain according to Federal standards. Presumably it has determined what

inspection it deems necessary. The uniform grades established by Federal authority are public and known throughout the country. The buyer and seller in North Dakota can each in the determination of the value of grain exercise their judgment as to the grade which will be given that grain when finally inspected by a Federal Inspector. The licensing of the *buyer by the State,* clothing him with a right and authority to grade grain bought from the producer, does not tend to safeguard the producer. It simply imposes upon interstate commerce a dual system of inspection, one lawful and one wholly unwarranted.

THE EXISTENCE OF A STATE POWER TO REGULATE PUBLIC WAREHOUSES DOES NOT IN ANY DEGREE TEND TO ESTABLISH A STATE POWER TO DIRECTLY REGULATE AND CONTROL THE MARKETING OF GRAIN IN INTERSTATE COMMERCE.

The State cannot under any guise impose a *direct* burden on or *control* interstate commerce or *fetter by conditions the right of individuals or corporations to carry on such commerce within the State.*

But beyond this, until Congress acts, the State may exercise within its borders its inherent power *although interstate commerce may thereby be indirectly affected.* These principles were applied and their applications distinguished in the two leading cases of

Munn v. Illinois, 94 U. S. 113.

Wabash, etc., Railway Company v. Illinois, 118 U. S. 557.

In the Munn case it was established:

Grain warehouses are devoted to a public use and are therefore subject to public control. They may be incidentally connected with interstate commerce but not necessarily so. They lend themselves properly to local regulation. Until Congress acts, the State in which a warehouse is located may exercise its governmental powers over it even though it thereby indi-

rectly affects interstate commerce.

In the Wabash case the Court definitely determined:

That the State power of regulations referred to in the Munn case did not extend to acts constituting an integral part of interstate commerce itself, or to those subjects related to interstate commerce requiring uniform regulation. The Court refused to sustain under the rule of the Munn case a state regulation which affected charges for interstate transportation.

In the Wabash case this rule laid down in *Hall v. Decuir*, 95 U. S. 485, is quoted and approved of:

> "But we think it may safely be said that State regulation which seeks to impose a direct burden on interstate commerce or interfere directly with its freedom does encroach on the exclusive power of Congress."

The distinction thus drawn has never been questioned or modified by the Federal Courts. Following *Munn v. Illinois*, different State regulations of public warehouses were sustained in

Budd v. New York, 143 U. S. 517.

Brass v. Stoeser, 153 U. S. 391.

Cargill v. Minnesota, 180 U. S. 452.

Merchants Exchange v. Missouri, 248 U. S. 363.

In all of these cases the question involved was the right of the State to regulate the conduct of public warehouses located within the State. In *Cargill v. Minnesota*, the State requirement of a license for a public warehouse was only sustained because:

> "*The Statute puts no obstacle in the way of the purchase by the defendant company of grain in the State or the shipment out of the State of such grain as it purchased.* The license has reference only to the business of the defendant at its elevator and warehouse." (Italics ours.)

Brass v. Stoeser sustained a North Dakota Statute requiring public warehouses to receive grain for storage at the rates established by the Statute. Even this Statute was sustained

by a bare majority of the Court, four Justices dissenting. *North Dakota still has this Statute.* The validity of this Statute establishing a complete regulation of public warehouses is not here questioned. The Statute of which we complain attempts an exercise of State power involving an entirely different subject. It regulates the buying of grain, whether at a public warehouse or elsewhere. It does the very thing, the absence of which is referred to in the Cargill case as sustaining the validity of the Minnesota Statute. The warehouse statutes of North Dakota are sustainable under the rule of the Munn and Brass cases. The State Statute regulating and controlling the marketing of grain is wholly independent of any warehouse regulation and is invalid within the rule of the Wabash case. The rule applicable to the North Dakota Statute regulating the marketing of North Dakota grain is the rule that the State cannot under any guise impose a direct burden on or control interstate commerce or fetter by conditions the right of individuals or corporations to carry on such commerce within the State. The two rules, with the distinguishing conditions, are clearly stated in the *Minnesota Rate Cases,* 230 U. S. 352, at 398, 399, 400, as follows:

> "The general principles governing the exercise of State authority when interstate commerce is affected are well established. The power of Congress to regulate commerce among the several states is supreme and plenary. It is 'complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution.' *Gibbons v. Ogden*, 9 Wheat. 1, 196.
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> "It has repeatedly been declared by this Court that as to those subjects which require a general system or uniformity of regulation the power of Congress is exclusive. In other matters, admitting of diversity of treatment according to the special requirements of local conditions, the states may act within their respective jurisdictions until Congress sees fit to act.
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> "The principle, which determines this classification, un-

> derlies the doctrine that the states cannot under any guise impose direct burdens upon interstate commerce. For this is but to hold that the states are not permitted directly to regulate or restrain that which from its nature should be under the control of one authority and be free from restrictions save as it is governed in the manner that the national legislature constitutionally ordains."

Notwithstanding the clear distinction between the two lines of cases and the fact that the Warehouse Acts were declared both by the Circuit Court of Appeals and this Court to be in an entirely different class from these North Dakota Grain Grading Acts, counsel for the State still insist on urging that the cases upholding such Statutes are authority for their position here. The answer lies in the opinions in those cases and in the opinion of this Court in the Lemke case. It was there said, in distinguishing *Merchants Exchange v. Missouri*, 248 U. S. 365, that:

> "The act there in question did not undertake to regulate the buying of grain in interstate commerce, nor to levy a license tax upon the privilege, nor to fix the profit which could be realized on grain bought, shipped and sold in interstate commerce."

Or as it was succinctly put by the Circuit Court of Appeals in the same case:

> "The existence of a state power to regulate public warehouses does not establish a state power to directly regulate and control the marketing of grain in interstate commerce, and authorities in support of the power to regulate warehouses are not in point."

An examination of the Missouri Warehouse Statute case clearly indicates that it merely sustains the regulation of public warehouses and that it has no application to the statute or the facts in this case. At page 366 Mr. Justice Brandeis states the question involved in the Missouri case as follows (*Merchants Exchange v. Missouri*, 248 U. S. 365):

> "A statute of Missouri relating to the inspection and weighing of grain, approved March 20, 1913 (Laws, Mis-

souri, 1913, pp. 354-373), and amended March 23, 1915 (Laws, Missouri, 1915, p. 302) declares that in cities of more than 75,000 inhabitants all buildings used for the storage or transferring of grain of different owners, for a compensation, shall be deemed public warehouses; and by Sec. 63 (p. 372) thereof, prohibits under severe penalties 'any person, corporation or association other than a duly authorized and bonded state weigher to issue any weight certificate * * * (for any) grain weighed at any warehouse or elevator in this state where duly appointed and qualified state weighers are stationed, * * * or to make any charge for such weighing, * * * or weight certificates.'" * * *

He states the Court's decision as follows:

"First. Section 63 of the Act does not violate the Fourteenth Amendment. As the State Court has pointed out, the statute does not prohibit owners of grain from weighing it before it is sent to a public warehouse or after it is removed therefrom. But the issue of a private weigher's certificate in addition to the certificate of the public weigher might lead to embarrassment or confusion or prove a means of deception. The regulation of weights and measures with a view to preventing fraud and facilitating commercial transactions is an exercise of the police power. To *require that goods received in or discharged from public warehouses shall be weighed by public weighers* and that no one else shall issue certificates of or make charges for weighing under those circumstances *is not an unreasonable or arbitrary exercise of the discretion vested in the legislature.*" (Italics ours.)

Clearly this Statute is sustained upon the principle announced in the Munn case that warehouses are devoted to a public use and that a warehouse located within the State is subject to regulation by the State even though some interstate commerce may pass through such warehouse.

The Missouri Statute, like the Minnesota Statute, considered in the Cargill case, the Illinois Statute considered in the Munn case, the Dakota Statute considered in the Brass case, does not purport to regulate generally *the buying or selling of grain,* does not *prohibit buying grain unless a license fee, a tax on the*

privilege, is paid, and clearly does not tend to sustain a State Statute regulating and controlling the marketing and distribution of grain through interstate commerce.

II.

THE 1922 ACT, LIKE THE 1919 ACT, CONFLICTS WITH THE UNITED STATES GRAIN STANDARDS ACT AUTHORIZING THE ESTABLISHMENT OF FEDERAL GRADES AND SERVICE AND REGULATORY ANNOUNCEMENTS NUMBERS 33 AND 46 ESTABLISHING THEREUNDER OFFICIAL GRAIN STANDARDS OF THE UNITED STATES FOR WHEAT, SHELLED CORN AND OATS.

The Federal Act, 39 Stat. L. 482, being Part B of the Agricultural Appropriation Act of August 11, 1916, Chapter 313, authorizes the Secretary of Agriculture, after investigation, to establish standards of quality and condition for different kinds of grain, to be known as the Official Grain Standards of the United States, and, under this authority, the Secretary of Agriculture has established such standards for wheat, corn and oats.

Section 4 of the Federal Statute prohibits the shipment or sale or agreement to sell grain described by the terms of the Federal grades unless such grain has been inspected and graded by a Federal Inspector.

Section 7 of the Federal Statute provides for licensing Federal Inspectors and authorizes the issuance of Federal licenses to persons duly authorized and employed to inspect and grade grain under the laws of any State which has a State Grain Inspection Department, but it further provides:

> "That no person licensed by the Secretary of Agriculture to inspect or grade grain or employed by him in carrying out any of the provisions of this Act shall, during the term of such license, or employment, be interested, financially or otherwise, directly or indirectly, in any grain elevator or warehouse, or in the merchandising of grain, nor shall he be in the employment of any person or corporation owning or operating any grain elevator or warehouse."

The Federal Statute thus affords an opportunity for the harmonious application of the Federal grades and inspection to grain moving in interstate commerce and State inspection of grain not moving between States. The State of North Dakota, however, did not in the 1919 Act and does not in the present Act see fit to conform to this provision of the Federal Statute. The necessary effect in practice of the North Dakota Statute is that all grain will actually be graded and inspected by persons interested in merchandising grain or by employees of grain elevator owners. It necessarily contemplates the issuance of State licenses to persons who are not qualified to hold Federal licenses.

Furthermore, as to all grain purchased in North Dakota, whether for export or for local consumption, the State inspection and the rules and regulations governing the State inspection, will be applied and enforced. Such a situation necessarily results in confusion and conflict. This objection to the North Dakota Grain Grading Act was urged in the attack on the 1919 Act, and although this Court did not consider it necessary to pass upon this question, the Circuit Court of Appeals specifically made this one of the grounds for holding the 1919 Act invalid. In this respect, there is no difference between the two Acts and Circuit Judge Carland's opinion regarding the conflict between the 1919 Act and the United States Grain Standards Act, is directly applicable to the 1922 Act. In Farmers *Grain Company of Embden* v. *Langer*, 273 Fed. 635, at page 651, he says:

> "There remains to be considered the question as to whether the state law conflicts with the United States Grain Standards Act. As we have said with reference to the question as to whether the law is a burden on interstate commerce, so we say now that if the purchase of grain in North Dakota under the evidence in this case, and the shipment thereof to the terminal markets mentioned for sale, is a unit in interstate commerce, then of course any attempt to regulate that commerce by the State of North Dakota is in direct conflict with the Grain Standards Act,

wherein Congress sought to establish a uniform system for the inspection and grading of such grain moving in interstate commerce. Both acts ought not to be and cannot be enforced, without confusion and embarrassment as the State Inspector declared. Section 4 of the Grain Standards Act heretofore quoted, makes it unlawful to ship or deliver for shipment in interstate or foreign commerce any such grain which is sold, offered for sale, or consigned for sale by grade, unless the grain shall have been inspected and graded by an inspector licensed under the act. By the second proviso of said section such grain may be shipped or delivered for shipment in interstate or foreign commerce without inspection at point of shipment by an inspector licensed under the act to or through any place at which an inspector licensed under the act is located, subject to be inspected by a licensed inspector at the place to which shipped or at some convenient point through which shipped for inspection, which inspection shall be under such rules and regulations as the Secretary of Agriculture shall prescribe. This proviso, as we understand it, would authorize a shipment of grain in interstate commerce from a point in North Dakota where there was no licensed inspector under the Federal Act to Minneapolis or Duluth, in Minnesota, to be there inspected by a Federal Inspector. The state law, however, declares that one may not even buy a bushel of wheat for shipment in interstate commerce without taking out a license to do so and promising to obey all the provisions of the state law and the regulations of the State Inspector, and the wheat purchased must be inspected in North Dakota and again at Duluth or Minneapolis. This brings the two laws clearly in conflict, if they both have to do with interstate commerce.

As we have said before, the state law authorizes the State Inspector to establish grades for grain and the Secretary of Agriculture by the Grain Standards Act is vested with the same power. These powers are directly in conflict, if they both relate to interstate commerce in grain. The United States Grain Standards Act provides that no person licensed by the Secretary of Agriculture to inspect or grade grain during the term of such license or employment shall be interested, financially or otherwise, directly or indirectly, in any grain elevator or warehouse, or in the merchandising of grain, nor shall he be in the employment of any person or corporation owning or operating any grain elevator or warehouse. The state law provides that the term 'deputy inspector of grades, weights and measures,' within the meaning of the law, shall mean any

firm, person, company, corporation, or association that buys, weighs, and grades grain, seeds, and other agricultural products who holds a license issued therefor by the state inspector of grades, weights and measures. Thus one law requires that the inspector shall have no interest in the business and the other law requires that he shall. Which law is to prevail? Certainly the Federal law, if the business is interstate commerce. It is useless to discuss further the matter of conflict, for the reason that, if both laws relate to the same subject, the state law attempts to regulate something that the State has no power to regulate, and, Congress having acted, the state law is in direct conflict with the Federal law."

DUAL INSPECTION CANNOT BE AVOIDED IF THE STATE AND FEDERAL ACTS ARE BOTH IN FORCE.—This results necessarily in over-lapping and conflicting regulations and unnecessary license fees, and imposes a substantial burden on every merchant engaged in commerce in grain. He must buy in North Dakota according to the North Dakota Statute and the rules and regulations promulgated thereunder by the State authorities. He must sell in Minnesota under the Federal Standards and the rules and regulations established by the Secretary of Agriculture. If he appeals any question arising out of the purchase of grain, his appeal goes to the State Supervisor and is disposed of within the discretionary power vested in the State authorities. If he appeals any question arising out of the sale of grain, his appeal is determined by the Federal authorities. At no point and by no process can he obtain one ruling or regulation covering both ends of his commerce in grain. The record in the Lemke case clearly indicates the uncertainty, inconvenience and hardship resulting to the grain buyers by reason of this situation during the period when the 1919 Act was in force. Under the old law, it frequently occurred that North Dakota grain, bought in interstate commerce was given a certain grade by the State Inspectors and the same grain when sold at the terminal markets outside of the State, was given a different grade under the system of Federal inspection. This dual inspection necessarily resulted in diverse grading

and makes commerce in grain uncertain and devoid of a single uniform regulation. As each system of grading independently determines the grade of grain, each necessarily conflicts with the other. There is no process by which a subsequent Federal inspection can overrule or change the grade given by the State inspection. This conflict is not a theory, but a continually existing fact.

THE DOCKAGE REQUIREMENTS of the North Dakota Statute necessarily lead to a conflict with the Federal System of Grading. Under the State law, the buyer is compelled to make a specific payment for dockage. At the terminal markets, he receives no payment for dockage as such, although sometimes he receives a premium price for wheat containing a large amount of dockage. The Federal rules and regulations do not require any payment for dockage, and it is the uniform custom at the terminal markets not to make any specific payment for dockage nor to return the dockage to the seller. Thus again the commerce in grain is subject to two contrary rules and regulations.

A DIRECT VIOLATION OF THE FEDERAL STATUTE results from the fact that under Section 3113 of the Compiled Laws of North Dakota for 1913, warehouse receipts issued by an elevator in North Dakota must provide for the delivery of the wheat by weight and grade at any terminal market upon payment of the freight rate between the elevator and the terminal. These warehouse receipts are negotiable. The grain represented by such a receipt may be sold and delivered at Minneapolis by the negotiation of the warehouse receipt. The Federal Statute prohibits a sale of grain described by the terms of the Federal grades without an inspection first being had by a Federal Inspector. A transaction such as that just described would result in a direct violation of this provision of the Federal Statute, although it is in exact accordance with the North Dakota Statute and the established form of the North Dakota warehouse receipts.

THE TWO SYSTEMS INVITE AND CAUSE INNUMERABLE CONFLICTS.—It is apparent that endless conflicts will arise through the enforcement of the two inspection systems. The State Department is vested with and exercises plenary power to control every step in, and incident of, the purchase of grain. It fixes prices, requires payment for dockage, establishes rules and regulations to which it binds the buyers of grain by its licenses, hears the complaints of the sellers, requires additional payment for or the return of dockage in response to such complaints, requires bonds to protect the farmer who sells on credit, revokes licenses and exacts a license fee from the buyers of grain to support it and to supply the funds required to enable it to thus interfere with and hamper interstate commerce in grain. Obviously, the purchaser of grain in North Dakota is between two millstones independently operated and controlled.

THE ENTIRE STATE STATUTE IS INVALID.—This is not a case involving a Statute which is, in the main, valid although it contains certain invalid provisions. The purpose of this Statute is made clear by its own language. It is designed to control the marketing of grain in North Dakota. If it cannot succeed in doing so, it must fail as an entirety. It is a unit and is either all valid or all invalid.

This Statute, in effect, requires a license for the privilege of engaging in interstate commerce. The fee exacted for this license is a tax on that privilege and whether it be large or small, the Statute requiring it is wholly invalid. Under some Statutes requiring a license, it has been said that the licensee is not bound to comply with unlawful requirements and the Statutes have therefore been upheld. This is only because the requirement of the license for the purpose involved in such cases is valid in the first instance. The purpose for which the North Dakota Act requires a license is State control of interstate commerce and cannot under any circumstances be upheld.

Those cases which hold that the exercise of the police power

of a State upon a subject over which Congress has *concurrent* authority is sustained if the State Act does not conflict with, but is in aid of, Federal Legislation which does not purport to occupy the entire field, are not in point. A case illustrating the application of this principle is *Asbell v. Kansas,* 209 U. S. 251, where at page 258, this Court stated:

> "But the law of Kansas now before us recognizes the supremacy of the national law and conforms to it. The state law admits cattle inspected and certified by an inspector of the Bureau of Animal Industry of the United States, thus avoiding a conflict with national law. Rule 13, issued by the Secretary of Agriculture under the authority of the Statute, is brought to our attention by the plaintiff in error. It is enough to say now that the rule is directed to transportation of cattle from quarantined states, which is not this case, and that in terms it recognizes restrictions imposed by the State of destination. Our attention is called to no other provision of national law which conflicts with the state law before us, and we have discovered none."

It is apparent that the North Dakota Statute is framed on an entirely different principle. It insists that the determination of grades must be made by State Inspectors as a condition of grain moving in interstate commerce. The mere adoption of the terms of the Federal Grades is idle. It is the compulsory inspection by State officials that actually establishes the grade and this compulsory inspection is directly in conflict with the Federal authority.

Nor can it be claimed in this case that the North Dakota Statute covers matters not covered by the Grain Standard Act as was the situation in *Savage v. Jones,* 225 U. S. 501, *Reid v. Colorado,* 187 U. S. 137, and other similar cases.

The fact that the dual inspection occurs in different states is not significant. Congress presumably when it undertook to regulate the inspection of grain and the establishment of grain standards provided for such inspections as it deemed necessary. Both acts relate to grading grain in the course of a unit of interstate commerce.

The usual Warehouse Act of the type sustained in *Munn v. Illinois,* has been held not in conflict with the Grain Standards Act (*Merchants Exchange v. Missouri, supra*), but this was on the stated ground that the State Act applied only to the weighing and warehousing of grain and did not purport to establish an exclusive system of grading an inspection applicable to all transactions in grain. Justice Brandeis makes this distinction clear when he says in that case:

> "That Act (the Federal Act) relates exclusively to the establishment by the Secretary of Agriculture of standards of quality and condition. It does not in any way refer to the weighing of grain."

Upon the elementary principle that if there is a conflict between the two Statutes the Federal law is supreme, it is scarcely necessary to refer to authorities,—the Federal Constitution and the laws enacted thereunder being the supreme law of the land.

In the *Minnesota Rate Cases,* 230 U. S., at 402 and 403, it is stated:

> "Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which nevertheless, with the acquiescence of Congress, have been controlled by State legislation from the foundation of the Government because of the necessity that they should not remain unregulated and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction but rather that the states should continue to supply the needed rules until Congress should decide to supersede them.
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> * * * * * * * * * *
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> "In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of its own."

A state law which interferes with interstate commerce is not

made valid by the fact that it also properly regulates intrastate transactions. The statement of this point demonstrates its correctness.

Bacon v. Illinois, 227 U. S. 504.
Railroad v. Husen, 95 U. S. 465.
Minnesota v. Barber, 136 U. S. 313.
Brimmer v. Rebman, 138 U. S. 78.
Patapsco Guano Company v. North Carolina, 171 U. S. 345.

From the supremacy of the Federal Statute it also follows that a regulation by Congress of interstate commerce is valid even though it thereby affects intrastate subjects. Congress may occupy the entire field of interstate commerce and completely regulate that commerce.

Brown v. Maryland, 12 Wheat. 419.
United States v. Colorado & Northwestern Railway Company, 157 Fed. 321.

We submit the conflict between the two Statutes is actual and substantial and that because of this conflict the North Dakota Statute is invalid.

III.

THE 1922 ACT VIOLATES THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION IN THE SAME MANNER AS THE 1919 ACT.

The North Dakota Statute authorizes and empowers the State Supervisor to revoke the license of any buyer, and thereby prohibit him from continuing his business of buying grain in interstate commerce, without any notice and without any opportunity afforded for a hearing. The provision for an appeal to the Court from arbitrary action in this does not afford the buyer sufficient protection. He would have the right to resort to the Courts to prevent such action whether there were

any provision for an appeal or not. In the meantime, however, he is deprived of the right to carry on his business and if such action were taken in the midst of the busy crop moving season, he would lose practically a year's business before the wrong could be remedied by the Courts.

To prohibit in this manner the profitable use of elevators is just as much a confiscation and destruction of property as it would be for the State to actually take possession of the elevator itself. While in the earlier cases there is some confusion as to what circumstances justify a summary confiscation or destruction of property under the due process clause, it has now become well established that the nature of the property is the determining factor in each case and that in order to justify such a confiscation or destruction, the State must be prepared to show that the property is dangerous to the safety or health of the community, otherwise it can only be condemned or destroyed by legal proceedings with due notice to the owner.

Sentell v. New Orleans, etc. R. R. Co., 166 U. S. 698.

1. An elevator is property of substantial value. The business of conducting it is not a public nuisance. The property is obviously of such a nature as to require legal proceedings for its confiscation and, within the rule cited above, the taking of such property or depriving the owner of the use of it without legal proceedings deprives the owner of his property without due process of law as guaranteed by the Fourteenth Amendment.

2. The limitations and restrictions placed by the North Dakota Statute on the terms on which grain may be bought in North Dakota, constitute an unlawful restriction of the liberty of contract guaranteed by the Fourteenth Amendment. As already indicated, the North Dakota Statute provides for, or contemplates rules and regulations providing for, the fixing of the price at which grain can be purchased in North Dakota, the specific payment for dockage or its return to the

seller, the licensing of buyers as a condition precedent to their right to purchase grain and the giving of security by the buyer whenever he purchases on credit. In short, the Statute purports to make the contract between the buyer and the seller for them and without regard to their wishes. If this Statute remains in force, no grain can be bought in North Dakota excepting under a contract of purchase, every important term of which is fixed by, or subjected to regulation by, the State authorities. Such a situation is a clear violation of the constitutional guarantee of liberty of contract.

In the insurance case (*German Alliance Insurance Company v. Kansas*, 233 U. S. 389), and in the rent cases (*Block v. Hirsh*, 65 L. Ed. 531, and *Marcus Brown Holding Co. v. Feldman*, 65 L. Ed. 539), we find the border line of the legislative power to regulate contracts. These decisions rest on existing situations. In the insurance case, because of the nature of the business, a few companies had obtained control of the rates of insurance and all persons desiring protection were obliged to deal with these companies. This condition does not exist in the grain business. Twenty-two hundred elevators compete with each other in buying grain. Many of them are farmers' co-operative companies. These co-operative companies establish the conditions under which grain is bought at country elevators. A producer is not dependent upon the country elevator. He may ship his grain to a terminal market. There is not and cannot, in the nature of things, be a control of market conditions by grain buyers similar to the control of insurance rates by the large companies. The rent cases involved an extraordinary and peculiar public hardship and necessity. Legislation regulating the marketing of grain falls outside the boundary line of legislative control of contracts established by the insurance and rent cases.

We submit that the North Dakota Statute constitutes an infringement of rights guaranteed by the Fourteenth Amendment as well as a direct and substantial burden on interstate com-

merce and a source of conflict with the United States Grain Standards Act.

IV.

Appellants' Argument.

By far the greater portion of the appellants' brief is directed toward persuading this Court that an evil exists in the conditions surrounding the marketing of grain in the Northwest, which calls for legislative interference. As already stated, we do not concede this position. On the other hand, we are not here to argue this question. It is totally immaterial on the issues raised in the present case. This was clearly pointed out by this Court in the Lemke case but nevertheless the appellants still insist on injecting into the case both in their pleadings and in their brief, a further discussion of this point.

The only purpose which appellants' allegations of existing evils in the grain trade serve is to illustrate even more clearly the effect which the State is seeking to accomplish by the Grain Grading Act. The Court will note that although the appellants attempt to justify the 1922 Act on the ground that it regulates only the *grading* of grain, an operation which it is claimed necessarily takes place before the sale of the grain, this is merely a subterfuge. The real factor in which the State of North Dakota is interested is the *price* which the farmer gets for his grain. This is clearly brought out in the appellants' brief. We quote the following passages as a few instances of the State's position:

> "It is at the local elevator point that the disposition of most of the grain raised is made, and it is therefore of the utmost importance that the maximum of protection be extended at such marketing point in order that the producer in particular be afforded fair treatment *and proper returns*" (Appellants' Brief, p. 2).
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> "In view of the importance of the grain business and the vital dependence thereon by the entire State and in view of the further fact that the returns of the great ma-

> jority of residents of North Dakota is specifically fixed by the *price* obtained for their grain, and that the *price* for the grain is necessarily almost wholly determined from the grade given such grain, the vital importance of the grading of grain becomes at once manifest" (Appellants' Brief, p. 12).

Moreover, it is admitted by the appellants in their brief that the avowed purpose of the North Dakota Act is to regulate interstate commerce. They say on page 8 of their brief:

> "It is the intention of said Act that all grain *included within interstate commerce* should be graded and inspected in accordance with the grades fixed by the Secretary of Agriculture under that Act. This is the single great purpose of the Federal Act. * * * It is our contention here that the present Act is a State inspection measure, solely calculated to assist, supplement and carry out to the fullest extent, through the police power of the State, the aims and purposes of the Federal Act."

Insofar as the 1919 and 1922 Acts affect and operate directly on interstate commerce, the appellants attempt to cite five alleged differences between the two Acts. These differences are either purely theoretical and furnish no basis for a distinction, or else they are not supported by an examination of the provisions of the two Acts.

(1) Appellants state "the 1919 Act was most vitally different from the present Act in that the 1919 Act required such license in order to either *buy or grade grain*, whereas the present Act simply requires a license to be authorized to *grade* grain" (Appellants' Brief, p. 11).

We have already seen that this is in fact a difference without a distinction. The manner in which commerce in grain is carried on is an existing fact which cannot be disregarded. Under this existing state of facts, it is futile to draw such a distinction. Grain must be graded by the buyer and not otherwise. To require a license to grade grain is in fact to require a license to buy grain. This is repeatedly admitted by the appellants in their brief and will not be disputed. This being

so, any distinction between the 1919 Act and the 1922 Act on this ground becomes a mere verbal distinction without any practical force or effect whatever.

(2) Appellants further state: "under the old Act, grain buyers were made deputy State Inspectors, while under the new Act they are simply required to hold a license."

It is difficult to conceive that counsel seriously contend that there is any such magic in a name. What difference does it make what the State of North Dakota proposes to call its licensees? The fact that they are not given any name under the new Act does not relieve them of any of the obligations imposed by their license. These obligations remain the same and it is these obligations, and not the title conferred on them, that renders the license requirement obnoxious.

(3) Appellants further state: "under the old Act, the rules and regulations made by the State Inspector were wholly in control. Under the new Act, in effect, any rules and regulations made under the said Act are subordinated to rules and regulations by the Secretary of Agriculture."

Just what provision of the new Act brings about this effect is not obvious. The only regulations of the Secretary of Agriculture which are specifically adopted by the new Act, are those which establish Federal grades. We do not find anything in the North Dakota Act which subordinates the rules and regulations of the State Department to those of the Federal Department in any other respect.

(4) Appellants further state: "under the old Act, a license fee was required, while under the new Act a license is issued without charge."

Again appellants are pointing out a difference in theory only and not in fact. We have already indicated that the administration of the Grain Grading Act is supported solely by the increase in the warehouse fees, that buyers are necessarily warehousemen and that the collection of an additional and excessive fee from the buyer as a warehouseman is merely an in-

genious method of compelling the buyers to provide the funds necessary to administer the Grain Grading Act as a whole.

(5) The appellants further state: "under the old Act authority was given to the Inspector to fix the margin of profit. * * * Under the new law, no authority is given to fix a margin or to punish for an unreasonable margin, the power of the State Supervisor being simply to investigate on that subject in order that information as to the margin may be forthcoming for the information of all persons interested."

This statement carefully overlooks the fact that the law in terms authorizes the State Supervisor to *supervise* as well as to investigate the subject of margins and that it is made his duty to exercise this power *with a view to preventing unreasonable margins.* It also overlooks the fact that the Supervisor is vested with all the duties *formerly performed* by the State Inspector of grades, weights and measures.

The appellant has cited no cases other than those illustrating principles on which we have already commented. They rely principally on three types of cases: First—those upholding the validity of the ordinary warehouse Statute; Second—those upholding State Statutes on a subject over which the State and the Federal Governments have *concurrent* jurisdiction where the Federal legislation on the subject has not occupied the entire field; and third—those upholding State Statutes requiring inspection of articles, such as food, oil, etc., which are inherently dangerous to the health and welfare of the community. We have already commented on all three of these types of cases and have found that none of them are in the least in point on the present issue.

The appellants have totally failed to show any substantial distinction between the 1919 Act and the 1922 Act. In spite of what is said on page 5 of appellants' brief, this is what led the trial Court to grant a temporary injunction. We submit that an examination of the two Statutes in the light of admitted facts will justify no other conclusion and that the order

of the trial Court granting a temporary injunction should be affirmed.

Respectfully submitted,

H. A. LIBBY,
Grand Forks, North Dakota,
WILLIAM A. LANCASTER,
DAVID F. SIMPSON,
JOHN JUNELL,
JAMES E. DORSEY,
ROBERT DRISCOLL,
630 1st Nat-Soo Line Bldg.,
Minneapolis, Minnesota,
Attorneys for Appellees.